

**Notice of Public Hearing Regarding NCR
Applications for Use Permit No. 2008-033 &
Reasonable Accommodation No. 2009-009**

(June 27, 2009)

FILE COPY

PROOF OF PUBLICATION

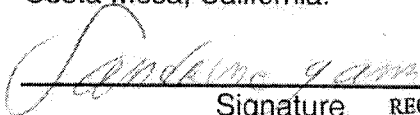
STATE OF CALIFORNIA)
) SS.
COUNTY OF ORANGE)

I am a Citizen of the United States and a resident of the County aforesaid; I am over the age of eighteen years, and not a party to or interested in the below entitled matter. I am a principal clerk of the NEWPORT BEACH - COSTA MESA DAILY PILOT, a newspaper of general circulation, printed and published in the City of Costa Mesa, County of Orange, State of California, and that attached Notice is a true and complete copy as was printed and published on the following dates:

June 27, 2009

I declare, under penalty of perjury, that the foregoing is true and correct.

Executed on June 29, 2009 at
Costa Mesa, California.



Signature RECEIVED BY

PLANNING DEPARTMENT

JUL 02 2009

CITY OF NEWPORT BEACH

NOTICE OF PUBLIC HEARING
GROUP RESIDENTIAL USE PERMIT No. 2008-033
and
REASONABLE ACCOMMODATION No. 2009-009
NEWPORT COAST RECOVERY
1216 WEST BALBOA BOULEVARD

NOTICE IS HEREBY GIVEN that on Tuesday, July 7, 2009, at 3:00 p.m., a Hearing Officer designated by the City Council of the City of Newport Beach will reopen a public hearing in the City Council Chambers (Building A), at 3300 Newport Boulevard, Newport Beach, California, to consider the application of Newport Coast Recovery for property located at 1216 West Balboa Boulevard for Use Permit No. UP2008-033. The Hearing Officer shall consider the following:

- An application requesting approval of a use permit to allow a residential care facility to operate a licensed adult alcohol and/or drug abuse recovery treatment facility. A public hearing for this application was initially held on December 8, 2008, at which time the item was continued to January 12, 2009. At the January 12, 2009, public hearing the Hearing Officer made findings for denial of the use permit; and on February 4, 2009, adopted Resolution No. HO-2009-001 denying with prejudice Use Permit No. UP2008-033. This action was appealed by the applicant and a public hearing conducted by City Council was held on March 24, 2009, at which time the matter of the appeal was not acted upon, but the use permit issue was remanded back to the Hearing Officer for consideration of newly acquired evidence.

At the same date, time and location, the Hearing Officer will also open a public hearing to consider Newport Coast Recovery's application for Reasonable Accommodation No. RA2009-009 for the following:

- A Reasonable Accommodation application for an existing residential care facility to operate a licensed adult alcohol and/or drug abuse recovery and treatment facility in an R-2 District, where such uses are not permitted. The applicant requests the following:
 1. An exemption from the portions of NBMC Section 20.10.020 (Residential Districts: Land Use Regulations) that require Residential Care Facilities, General to be established only in residential districts zoned Multi-Family Residential (MFR) with a use permit, subject to the operational conditions recommended by City staff in the January 12, 2009 staff report for Use Permit No. 2008-03, including a maximum occupancy of 14 residents, which was denied by the Hearing Officer; or, in the alternative,
 2. An exemption from the requirements specified in NBMC Section 20.91A.050 (Development and Operational Standards), including a waiver of the occupancy restriction of two persons per bedroom plus one staff member, and to allow a total occupancy of 18 residents;
 3. An exemption from the parking requirements of one off-street parking space for each three resident beds, as specified in NBMC Section 20.66.030 (Off-Street Parking and Loading Requirements) for Residential Care, General use classifications, and to apply the off-street parking requirements applicable to Two-Family Residential (R-2) use classifications, which requires two off-street parking spaces per dwelling unit;
 4. Treat the use of the licensed residential care facility as a legal nonconforming use;
 5. Apply the California Building Code provisions that were applicable at the time the residential care facility was established as relates to life and fire safety matters; and
 6. A waiver of the required finding specified in NBMC Section 20.91A.009 (D), relative to the compatibility of the use with the character of the surrounding neighborhood, which requires a finding that the continued use will not contribute to the changing of the residential character of the neighborhood, such as creating an overconcentration of residential care uses in the vicinity, and waiving the impact analysis contained in the Factors A through C, which the Hearing Officer must consider in making or sustaining the finding with regard to the proximity of the use to schools, churches, playgrounds, day care centers, and alcoholic beverage outlets, and the application of the American Planning Association standard of permitting one or two such uses per block.

This activity has been determined to be categorically exempt under the requirements of the California Environmental Quality Act (CEQA) under Class 1 (Existing Facilities). This class of projects has been determined not to have a significant effect on the environment and is exempt from the provisions of CEQA. This activity is also covered by the general rule that CEQA applies only to projects that have the potential for causing a significant effect on the environment (Section 15061(b)(3) of the CEQA Guidelines). It can be seen with certainty that there is no possibility that this activity will have a significant effect on the environment and it is not subject to CEQA.

All interested parties may appear and present testimony in regard to these applications. If you challenge these projects in court, you may be limited to raising only those issues you or someone else raised at the public hearing (described in this notice) or in written correspondence delivered to the City, or prior to the public hearing. The staff report may be reviewed at the Planning Department, City of Newport Beach, 3300 Newport Boulevard, Newport Beach, California, 92663 or at the City of Newport Beach website at www.city.newport-beach.ca.us beginning on the Thursday prior to the hearing. For more information, call (949) 644-3232 or (949) 644-3002. To be added to a permanent notification list of these hearings, e-mail dkiff@city.newport-beach.ca.us and ask to receive these notices.

Project File No.: RA2009-104
Activity No.: UP2008-033 and RA2009-009
Dave Kiff, Assistant City Manager, City of Newport Beach
Published Newport Beach/Costa Mesa Daily Pilot June 27, 2009

NOTICE OF PUBLIC HEARING
GROUP RESIDENTIAL USE PERMIT No. 2008-033
and
REASONABLE ACCOMMODATION No. 2009-009

NEWPORT COAST RECOVERY
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At the same date, time and location, the Hearing Officer will also open a public hearing to consider Newport Coast Recovery's application for Reasonable Accommodation No. RA2009-009 for the following:

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 1. An exemption from the portions of NBMC Section 20.10.020 (Residential Districts: Land Use Regulations) that require Residential Care Facilities, General to be established only in residential districts zoned Multi-Family Residential (MFR) with a use permit, subject to the operational conditions recommended by City staff in the January 12, 2009 staff report for Use Permit No. 2008-33, including a maximum occupancy of 14 residents, which was denied by the Hearing Officer; or, in the alternative,
 2. An exemption from the requirements specified in NBMC Section 20.91A.050 (Development and Operational Standards), including a waiver of the occupancy restriction of two persons per bedroom plus one staff member, and to allow a total occupancy of 18 residents;
 3. An exemption from the parking requirements of one off-street parking space for each three resident beds, as specified in NBMC Section 20.66.030 (Off-Street Parking and Loading Requirements) for Residential Care, General use classifications, and to apply the off-street parking requirements applicable to Two-Family Residential (R-2) use classifications which requires two off-street parking spaces per dwelling unit;
 4. Treat the use of the licensed residential care facility as a legal nonconforming use;
 5. Apply the California Building Code provisions that were applicable at the time the residential care facility was established as relates to life and fire safety matters; and
 6. A waiver of the required finding specified in NBMC Section 20.91A.060 (D), relative to the compatibility of the use with the character of the surrounding neighborhood, which requires a finding that the continued use will not contribute to the changing of the residential character of the neighborhood, such as creating an overconcentration of residential care uses in the vicinity, and waiving the impact analysis contained in the Factors A through C which the Hearing Officer must consider in making or sustaining the finding with regard to the proximity of the use to schools, churches, playgrounds, day care centers, and alcoholic beverage outlets, and the application of the American Planning Association standard of permitting one or two such uses per block.

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Project File No.: PA2008-104

Activity No.: UP2008-033 and RA2009-009

Dave Kiff, Assistant City Manager, City of Newport Beach

**Memorandum from City Planning Dept.
Addressing NCR Applications for Use Permit
No. 2008-033 & Reasonable Accommodation
No. 2009-009**

(July 1, 2009)



CITY OF NEWPORT BEACH

MEMORANDUM

TO: Thomas W. Allen, Hearing Officer

FROM: Janet Johnson Brown, Associate Planner
jbrown@city.newport-beach.ca.us
(949) 644-3236

DATE: July 1, 2009

SUBJECT: Newport Coast Recovery, LLC (PA2008-104)
1216 West Balboa Boulevard

- Use Permit No. 2008-033
- Reasonable Accommodation No. 2009-009

Staff reports and exhibits addressing the applications submitted by Newport Coast Recovery and summarized below are attached this memorandum for the public hearing scheduled on Tuesday, July 7, 2009, at 3:00 p.m. in the Newport Beach City Hall Council Chambers.

PROJECT SUMMARY

An application requesting approval of a use permit to allow a residential care facility to operate a licensed adult alcohol and/or drug abuse recovery treatment facility. This application has been filed in accordance with Ordinance No. 2008-05, which was adopted by the City Council in January 2008.

A public hearing for this application was initially held on December 8, 2008, at which time the item was continued to January 12, 2009. At the January 12, 2009, public hearing the Hearing Officer made findings for denial of the use permit, and on February 4, 2009, adopted Resolution No. HO-2009-001 denying with prejudice Use Permit No. 2008-033. This action was appealed by the applicant and a public hearing conducted by City Council was held on April 14, 2009, at which time the matter was remanded back to the Hearing Officer for consideration of newly acquired evidence, which is the purpose of this hearing.

An application for Reasonable Accommodation requesting exemption from the Newport Beach Municipal Code (NBMC) to allow an existing residential care facility to operate a licensed adult alcohol and/or drug abuse recovery and treatment facility in an R-2 District,

where such uses are not permitted has also been submitted. The applicant requests the following:

1. An exemption from the portions of NBMC Section 20.10.020 (Residential Districts: Land Use Regulations) that require Residential Care Facilities, General to be established only in residential districts zoned Multi-Family Residential (MFR) with a use permit, subject to the operational conditions recommended by City staff in the January 12, 2009 staff report for Use Permit No. 2008-33, including a maximum occupancy of 14 residents, which was denied by the Hearing Officer;

or, in the alternative,

2. An exemption from the requirements specified in NBMC Section 20.91A.050 (Development and Operational Standards), including:
 - A waiver of the occupancy restriction of two persons per bedroom plus one staff member, and to allow a total occupancy of 18 residents;
 - An exemption from parking requirements specified in NBMC Section 20.66.030 and to impose parking requirements that treat the residents and the visitors of the residents in the same manner as any other resident or visitor to Newport Beach, particularly those requirements that pertain to weekend visitation;
 - Treat the use of the licensed residential care facility as a legal nonconforming use;
 - Apply the California Building Code provisions that were applicable at the time the residential care facility was established as relates to life and fire safety matters; and
 - A waiver of the required finding specified in NBMC Section 20.91A.060 (D), relative to the compatibility of the use with the character of the surrounding neighborhood, which requires a finding that the continued use will not contribute to the changing of the residential character of the neighborhood, such as creating an overconcentration of residential care uses in the vicinity, and waiving the impact analysis contained in the Factors A through C which the Hearing Officer must consider in making or sustaining the finding with regard to the proximity of the use to schools, churches, playgrounds, day care centers, and alcoholic beverage outlets, and the application of the American Planning Association standard of permitting one or two such uses per block.

ATTACHMENTS

Attachment A: Staff Report for Use Permit No. 2008-033
Attachment B: Staff Report for Reasonable Accommodation No. 2009-009
Attachment C: Administrative Record: May 20, 2008 to April 14, 2009
Attachment D: Correspondence Received after April 14, 2009

cc: Newport Coast Recovery, LLC

**Attachment A to City Planning Dept.
Memorandum: Staff Report for July 7, 2009
Use Permit Hearing
(Including Exhibit 1)**

Attachment No. HO 1
Staff Report for Use Permit No. 2008-033
Dated July 7, 2009

CITY OF NEWPORT BEACH HEARING OFFICER STAFF REPORT

July 7, 2009
Agenda Item 1

TO: Thomas W. Allen, Hearing Officer

SUBJECT: Newport Coast Recovery
1216 West Balboa Boulevard
• Use Permit No. 2008-033

APPLICANT: Newport Coast Recovery, LLC

CONTACT: Dave Kiff, Assistant City Manager
(949) 644-3002 or dkiff@city.newport-beach.ca.us

Janet Johnson Brown, Associate Planner
(949) 644-3236 or jbrown@city.newport-beach.ca.us

PROJECT SUMMARY

This is a use permit application to allow the continued operation of an existing licensed adult (males only) residential care facility providing a licensed treatment environment with a total occupancy of 29 persons. This application has been filed in accordance with Ordinance No. 2008-05, which was adopted by the City Council in January 2008.

A reasonable accommodation application has also been submitted and is addressed separately.

RECOMMENDATION

Staff recommends that the Hearing Officer conduct a re-opened public hearing, receive testimony from the applicant, the City of Newport Beach and its legal counsel, and members of the public. At the conclusion of the public hearing, staff recommends the Hearing Officer:

- Deny the request for a Use Permit based on an inability to make a finding that the operator, Newport Coast Recovery, acts in compliance with State and local law (finding based on NBMC §20.91A.060.A.8).

BACKGROUND

As you are aware, the two of us were present and served as staff (along with contract planner Debby Linn) for your decision on the Use Permit request by Newport Coast Recovery (1216 West Balboa Boulevard). These hearings were held on December 8, 2008 and January 12, 2009. On January 12, 2009, you determined that Use Permit No. 2008-033 be denied.

At the City Council's meeting on April 14, 2009, the City Council took an action to remand the Use Permit back to you to consider evidence acquired after your hearing on January 12, 2009 was closed.

This memorandum addresses only the new information learned after the close of the Use Permit hearing but relevant now that the Use Permit hearing has been re-opened. The information directly affects staff's recommendation on one finding (NBMC §20.91A.060.A.8) and obligates us to recommend denial of the Use Permit based on an inability to make this finding.

I. NEWLY-ACQUIRED INFORMATION

Between the January 12, 2009 hearing and today, two cases of note have come to the City's attention – in both cases, by parents of persons staying at Newport Coast Recovery. One case (Case #1) resulted in a Notice of Violation (Complaint #19-CR-20090327105641) being issued to Newport Coast Recovery by the California Department of Social Services (DSS) for a violation of California Health and Safety Code §1508. CA HSC §1508 reads as follows:

§1508. No person, firm, partnership, association, or corporation within the state and no state or local public agency shall operate, establish, manage, conduct, or maintain a community care facility in this state, without a current valid license therefor as provided in this chapter.

No person, firm, partnership, association, or corporation within the state and no state or local public agency shall provide specialized services within a community care facility in this state, without a current valid special permit therefor as provided in this chapter.

Except for a juvenile hall operated by a county, or a public recreation program, this section applies to community care facilities directly operated by a state or local public agency. Each community care facility operated by a state or local public agency shall comply with the standards established by the director for community care facilities.

As used in this chapter, "local public agency" means a city, county, special district, school district, community college district, chartered city, or chartered city and county.

The Notice of Violation is attached as Exhibit 1. State ADP has an ongoing investigation about this same issue.

The finding that cannot now be made is the following:

NBMC §20.91A.060 Finding A: That the use conforms to all applicable provisions of Section 20.91A.050. These development and operational standards are summarized as follows: ...

8. No owner or manager shall have any demonstrated pattern of operating similar facilities in violation of the law.

More detail about Case #1 and a description of Case #2 follows.

Case #1. On or about April 1, 2009, a mother who claimed to have a 17 year-old child in treatment at Newport Coast Recovery (NCR) for cocaine addiction contacted City staff. The information staff received from the boy's mother was troubling, and casts considerable doubt upon whether the Appellant manages this treatment facility in accordance with the law.

Among the troubling issues identified by Staff:

- NCR knowingly accepted two minor boys for treatment at NCR in apparent violation of their license from ADP. NCR further told DSS investigators that they held an "adolescent waiver" that allows treatment of minors at the NCR facility. ADP officials told the City on Friday,

April 3, 2009 that there is no record of NCR having an "adolescent waiver" authorizing Newport Coast to treat adolescents.

- There are allegations that one of the minors was instructed by NCR Staff to lie about his age if asked;
- One of the minor boys was taken off-site in another resident's personal vehicle, where the minor relapsed. The minor boy was then removed from NCR's facility and taken to a sober living facility in Costa Mesa ("Rutger's House") without notifying the child's parents;
- When Newport Beach and Costa Mesa Police found the child, NCR staff told the NBPD Officer that they would not take him back into the NCR facility because he was a minor, effectively abandoning him. The boy's family is in Nevada (mother) and the Central Valley (father), and he had no means to get home;

In an effort to allow NCR to defend itself and to include such defense in the record for this hearing, on April 18, 2009, City staff sent the below e-mail to Mr. Michael Newman of NCR, which was received by NCR's counsel but never answered.

From: Kiff, Dave
Sent: Saturday, April 18, 2009 3:40 PM
To: Michael Newman
Subject: Requests

Hi Mike –

If you would like, please run these questions by Mr. Polin or Mr. Brancart.

In preparation for the remanded use permit hearing, I have these requests. I regret that they sound like leading questions – they do indeed raise serious issues. As such, I would like to allow you a chance to help me understand your perspective.

- First, it is my understanding that you have asserted to a representative of DSS that Newport Coast Recovery has an adolescent waiver from ADP. Yet ADP told me that they have no record of this. Question: Can you clarify this and show me whether or not you have an adolescent waiver? ADP could be in error. I would note that your website, at one point at least, read: "Newport Coast Recovery is a 29-bed all male facility 18 years of age or older."
- Second, your website at one point read, "If a client relapses, he is not discharged, but is instead taken to a detox unit for urgent treatment lasting at the least, 72-hours before being re-admitted to our facility to work on the major issues causing his relapse. The staff concentrates on helping the client work through the relapse process." (sic) It is my understanding that one individual, Mr. _____, did relapse but was taken to Rutgers House, which appears to me to be a less intensive care situation. Questions: What is the actual process when someone relapses at Newport Coast? Was Mr. _____'s removal from your facility different from typical processes, and if so, why?
- Thirdly, I know that you have asserted that the Hearing Officer's denial should have been overturned because Newport Coast provides a unique service in the community, that being "the only 'Men's only' primary care facility in Newport. Other facilities require 30 days of primary care prior to entrance." To me, that implies that Newport Coast offers "Day 1" non-medical detoxification services, something that ADP does indeed license. But I do not see on ADP's records where Newport Coast is authorized to provide non-medical detox services. The classification on ADP's list for Newport Coast is "RES" versus "RES-DETOX". All that said, I may misunderstand the

continuum of care, and there may be a primary service that is not called detox. Question: Can you please assist me in learning more about whether ADP would consider you a primary care facility?

- Fourth, we need to schedule the hearing. I would like to do that the week of May 18-22, but need to communicate with you to check your calendar.

Thank you,

Dave Kiff
Assistant City Manager
City of Newport Beach
949-644-3002

Case #2. In late June 2009, City staff (Dave Kiff) was approached by a father and son who wanted to discuss the son's time with Newport Coast Recovery. Again, this family's description of the son's time at NCR raises several troubling business practices:

- Son stayed there about five days. Son had come out of Pat Moore Foundation after a 72-hour stay. Mr. Mike Newman visited son "every day" at Pat Moore, asking him to come to NCR.
- Father paid \$10,000 to Newman in advance of son's stay.
- Son left NCR after about five days because there was no effective treatment – a MFCC came and talked to him for 20 minutes, the rest of the day was basically unsupervised. "The schedule they give you is very fluid."
- Son's friends were able to check him in and check him out – during his first days there.
- Son left one evening and the NCR staff didn't know he was gone 'til 9:00 a.m. the next day.
- When father tried to get the \$10,000 back, or a pro-rated portion of it after son left, Mr. Newman was unavailable, despite saying he would give the money back.
- NCR website's pledge of "home-cooked meals" equated to a \$55/week Albertson's card, with meals prepared on your own.
- When son came back to get papers, NCR gave him "about 3-4 pages of the 50+ pages" son signed.
- Son thinks that NCR deleted son's parents names from the contact information from son's form (son is not a minor).
- NCR lost son's passport and car title, despite it being "in the (NCR) safe."
- In early afternoon during a visit to attempt to find Mr. Newman, father walked in the building through an open door, with no controls. Father walked towards the back trying to find someone, and one male client was in a room watching TV. The client brought father back to the kitchen to a closed door and found the manager. Newman has never met with father after initial payment of the \$10,000.
- Father spoke of researching NCR further on the Internet, and noting that NCR's website exaggerates its qualities and qualifications – case in point is that NCR states that it has a different (higher) rating from the Better Business Bureau than NCR actually has. Staff attempted to verify this, and found up to four instances where this may be true.

Questionable Information on NCR's Website

NCR's website (viewed on June 29, 2009) may lead the reader to infer the following:

- That NCR is an "AAA" rated company by the Better Business Bureau (BBB). The BBB actually shows it as an "A-" rated firm, and apparently is not aware of NCR's violation from DSS for housing minors without a DSS license.

BBB Rating Information

NCR Website – 6-29-09



BBB Website – 6-29-09



- That NCR is state-licensed (it is) and certified. In California, residential treatment facilities like NCR must be licensed by ADP to provide one or more of five types of residential treatment. State ADP certification is a voluntary program for non-residential treatment programs. NCR is not eligible to receive this ADP certification. It is uncertain what certification NCR refers to when it states the below:

*"Newport Coast Recovery (NCR) is a state licensed **and certified** (emphasis added) inpatient drug and alcohol treatment facility offering gender specific treatment for men with addiction and co-occurring disorders. Our highly structured live-in program is 12 step based that incorporates a holistic philosophy"*

- That NCR is a member of the National Association of Addiction Treatment Providers ("NAATP"). The NCR website has a logo of the NAATP on it. The NAATP's website shows no record of having NCR as a current member.

What the NCR Website Says (6-29-09)

"(NCR is) .. Licensed by the California ADP, member of the National Association of Addiction Treatment Providers." "NCR is a member of NAATP..."

- That their medical director, Dr. Michael Rudolph, is a board-certified addiction medicine director. We have found no evidence that Dr. Rudolph is board-certified in addiction medicine – his office claims he is board-certified in Emergency Medicine. A website for another facility that Dr. Rudolph is affiliated with, "First House" in Costa Mesa says:

First House Website: *He (Dr. Rudolph) is currently a member of the American and California Societies of Addiction Medicine and is board eligible in the field of Addiction Medicine.*

NCR Website: *All of our case managers are state certified alcohol and drug counselors and our therapists are professionally licensed. Our Medical Director, Michael Rudolph, M.D., is a board certified addiction medicine doctor.*

Conclusion on Newly-Acquired Evidence. Given the above, especially Case #1, City staff is unable to recommend to the Hearing Officer that the finding based on NBMC §20.91A.060 – A (especially A.8) can be made. Additionally, NCR's website information shows a pattern of

providing apparently inaccurate information to readers (and potential clients) that overstates NCR's qualifications and standards.

Staff recommends a denial of this Use Permit application based on the inability to make the finding associated with NBMC Section 20.91A.060.A.8.

#

Exhibit No. 1

Department of Social Services Notice of
Violation



CDSS

JOHN A. WAGNER
DIRECTOR

STATE OF CALIFORNIA—HEALTH AND HUMAN SERVICES AGENCY
DEPARTMENT OF SOCIAL SERVICES

COMMUNITY CARE LICENSING DIVISION
770 The City Drive, Suite 7100 • Orange, CA • 92668
(714) 703-2840 • FAX (714) 703-2868 • www.cclid.ca.gov



ARNOLD SCHWARZENEGGER
GOVERNOR

April 1, 2009

Newport Coast Recovery
1216 West Balboa Blvd.
Newport Beach, CA. 92661

SUBJECT: NOTICE OF OPERATION IN VIOLATION OF LAW

REFERENCE: Unlicensed Operation

You are hereby notified that the above referenced facility is operating without a license which is a violation of California Health and Safety Code, Section 1508. This section prohibits any person, firm, partnership, association, or corporation within the state from operating, establishing, managing, conducting, or maintaining a Community Care Facility in the state without first obtaining a license. In accordance with Health and Safety Code Sections 1540, 1541, 1547, and other applicable laws, your continued operation without a license could result in civil and/or criminal action being taken against you.

Effective since 09/16/88, licensing regulations require the assessment of civil penalties for operation without a license. California Code of Regulations, Section 80058, indicates that:

A \$200.00 per day penalty shall be assessed for the continued operation of an unlicensed facility the 16th calendar day after the operator has been issued the Notice of Operation in Violation of Law and has not submitted a completed application as required. The \$200.00 per day penalty shall continue until the operator ceases operation or submits a completed application.

You may file an application for a license by contacting the Mike Valentine at (714) 292-5537. Continued operation pending licensure is a violation of law.

Licensing Program Analyst
Orange County Children's Residential District Office

COMPLAINT INVESTIGATION REPORT

This is an official report of an unannounced visit/investigation of a complaint received in our office on
03/27/2009 and conducted by Evaluator Mike Valentine

PUBLIC**COMPLAINT CONTROL NUMBER: 19-CR-20090327105641**

FACILITY NAME:	Newport Coast Recovery	FACILITY NUMBER:	Unlicensed
ADMINISTRATOR:		FACILITY TYPE:	UNLIC
ADDRESS:	1216 West Balboa Blvd.	TELEPHONE:	
CITY:	Newport Beach	STATE:	
CAPACITY:	0	ZIP CODE:	92661
		DATE:	04/01/2009
		CENSUS:	0
MET WITH:	Eric McCoy	TIME BEGAN:	01:00 PM
		TIME COMPLETED:	01:40 PM

ALLEGATION(S):

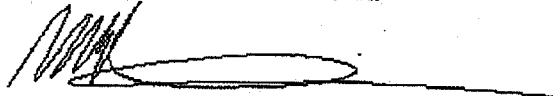
1 Unlicensed Care- Facility is providing care and supervision for minors at the above address.
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INVESTIGATION FINDINGS:

1 Based on investigation, there is concrete information received that facility did have 2 minors residing at their
2 facility and facility representatives confirmed the same. The 2 minors are no longer residing at facility as of this
3 date.
4

5 Thus above Allegation is substantiated, a Notice of Operating in Violation of the Law letter was issued.
6

7 Exit interview conducted, copy of the NOV letter, LIC 811, and this report provided.
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9
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13

Substantiated**Estimated Days of Completion:****SUPERVISOR'S NAME:** Lya Johnson**TELEPHONE:** (951) 782-4207**LICENSING EVALUATOR NAME:** Mike Valentine**TELEPHONE:** (714) 292-5537**LICENSING EVALUATOR SIGNATURE:****DATE:** 04/01/2009

I acknowledge receipt of this form and understand my appeal rights as explained and received.

FACILITY REPRESENTATIVE SIGNATURE:**DATE:** 04/01/2009

Control Number 19-CR-20090327105641
STATE OF CALIFORNIA - HEALTH AND HUMAN SERVICES AGENCY

CALIFORNIA DEPARTMENT OF SOCIAL SERVICES
COMMUNITY CARE LICENSING DIVISION
SO. REGION AC/RES., 770 THE CITY DR., SUITE
7100
ORANGE, CA 92668

COMPLAINT INVESTIGATION REPORT (Cont)

FACILITY NAME: Newport Coast Recovery
DEFICIENCY INFORMATION FOR THIS PAGE:

FACILITY NUMBER: Unlicensed
VISIT DATE: 04/01/2009

Deficiency Type POC Due Date / Section Number	DEFICIENCIES	PLAN OF CORRECTIONS(POCs)
Type A 04/01/2009 Section Cited 80006(a)(c)	1 Unlicensed Operation- This facility was operating 2 Unlicensed when facility accepted to minors under 3 the age of 18 years old, which is a Health and 4 Safety violations. 5 6 7	1 Minors are no longer residing at facility and facility 2 will not accept any residents under the age of 18 3 years old from this date and after. 4 5 6 7
	1 2 3 4 5 6 7	1 2 3 4 5 6 7
	1 2 3 4 5 6 7	1 2 3 4 5 6 7
	1 2 3 4 5 6 7	1 2 3 4 5 6 7

Failure to correct the cited deficiency(ies), on or before the Plan of Correction (POC) due date, may result in a civil penalty assessment.

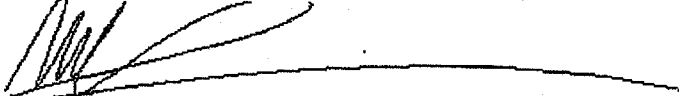
SUPERVISOR'S NAME: Lya Johnson

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**Attachment B to City Planning Dept.
Memorandum: Staff Report for July 7, 2009
Reasonable Accommodation Hearing**

(Including Exhibits 1 – 6)

Attachment No. HO 2
Staff Report for Reasonable Accommo-
dation No. 2009-009 Dated July 7, 2009

**CITY OF NEWPORT BEACH
HEARING OFFICER STAFF REPORT**

July 7, 2009
Agenda Item 2

TO: Thomas W. Allen, Hearing Officer

SUBJECT: Newport Coast Recovery, LLC (PA2008-104)
1216 West Balboa Boulevard
▪ Reasonable Accommodation No. 2009-009

APPLICANT: Newport Coast Recovery, LLC

CONTACT: Janet Johnson Brown, Associate Planner
(949) 644-3236, jbrown@city.newport-beach.ca.us

PROJECT SUMMARY

An application for Reasonable Accommodation requesting exemption from the Newport Beach Municipal Code (NBMC) to allow an existing residential care facility to operate a licensed adult alcohol and/or drug abuse recovery and treatment facility in an R-2 District, where such uses are not permitted. The applicant requests the following:

1. An exemption from the portions of NBMC Section 20.10.020 (Residential Districts: Land Use Regulations) that require Residential Care Facilities, General to be established only in residential districts zoned Multifamily Residential (MFR) with a use permit, subject to the operational conditions recommended by City staff in the January 12, 2009 staff report for Use Permit No. 2008-33, including a maximum occupancy of 14 residents, which was denied by the Hearing Officer;

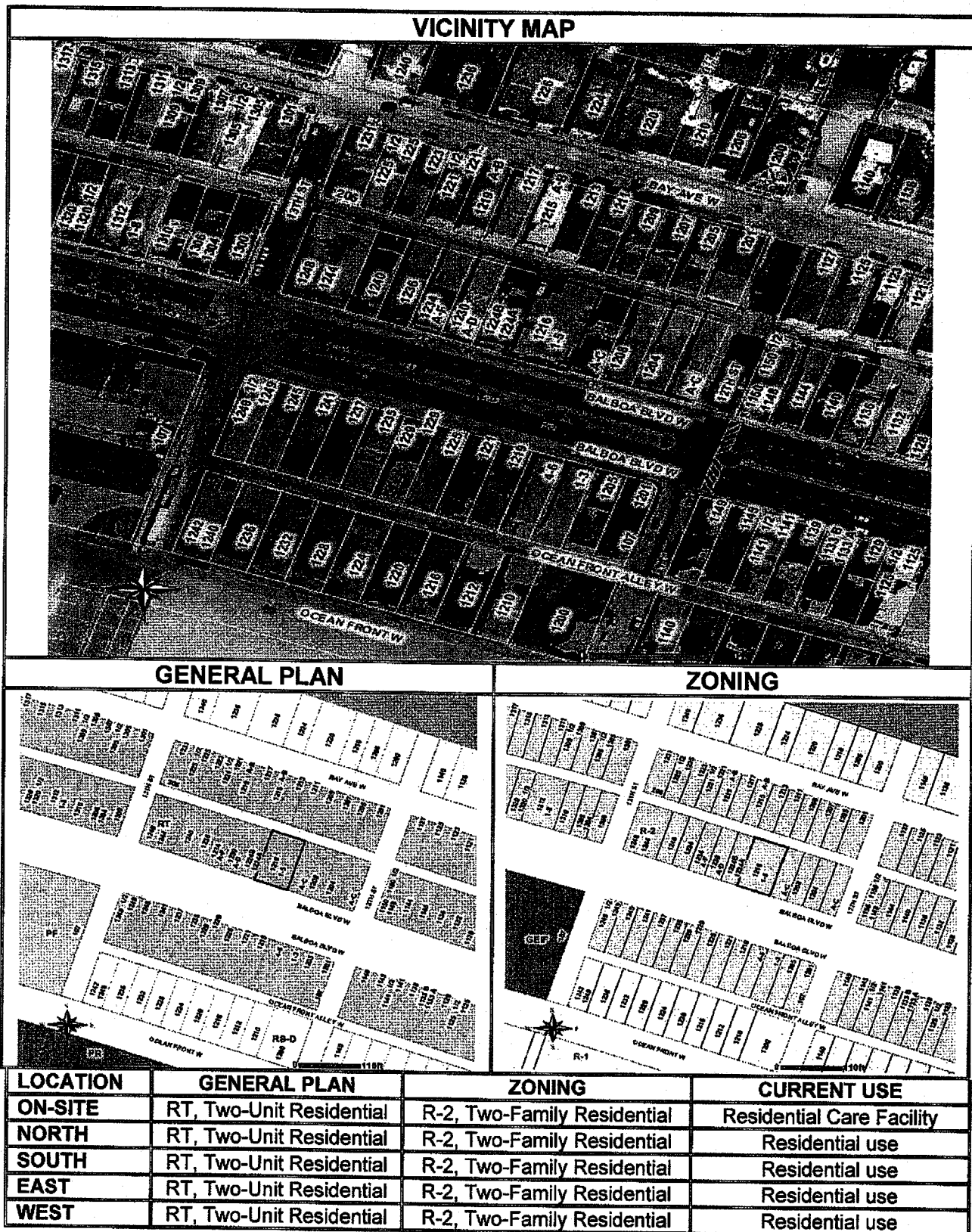
or, in the alternative,
2. An exemption from the requirements specified in NBMC Section 20.91A.050 (Development and Operational Standards), including:
 - A waiver of the occupancy restriction of two persons per bedroom plus one staff member, and to allow a total occupancy of 18 residents;
 - An exemption from parking requirements specified in NBMC Section 20.66.030 and to impose parking requirements that treat the residents and the visitors of the residents in the same manner as any other resident or visitor to Newport Beach, particularly those requirements that pertain to weekend visitation;
 - Treat the use of the licensed residential care facility as a legal nonconforming use;

- Apply the California Building Code provisions that were applicable at the time the residential care facility was established as relates to life and fire safety matters; and
- A waiver of the required finding specified in NBMC Section 20.91A.060 (D), relative to the compatibility of the use with the character of the surrounding neighborhood, which requires a finding that the continued use will not contribute to the changing of the residential character of the neighborhood, such as creating an overconcentration of residential care uses in the vicinity, and waiving the impact analysis contained in the Factors A through C which the Hearing Officer must consider in making or sustaining the finding with regard to the proximity of the use to schools, churches, playgrounds, day care centers, and alcoholic beverage outlets, and the application of the American Planning Association standard of permitting one or two such uses per block.

RECOMMENDATION

Staff recommends the Hearing Officer conduct a public hearing, receive testimony from the applicant, the City of Newport Beach and its legal counsel, and members of the public. At the conclusion of the public hearing, staff recommends the Hearing Officer:

1. Deny Reasonable Accommodation No. RA2009-009, based on the findings discussed in this report; and
2. Direct staff to prepare a Resolution of Denial for review and adoption by the Hearing Officer.



INTRODUCTION

Description of Project Operations

The subject facility located at 1216 West Balboa Boulevard is operated by Newport Coast Recovery, LLC, and is licensed by the State of California's Department of Alcohol and Drug Programs (ADP) to operate and maintain an adult residential alcohol and/or drug abuse/recovery or treatment facility for total occupancy of 29 persons. The facility's ADP license restricts treatment services to male residents.

The property is owned by Hayes Properties, LLC. The Clinical Director of Newport Coast Recovery is Mr. John Felton who manages the facility. To the best of the City's knowledge, the facility owners do not operate any other similar facility in the City of Newport Beach.

Current Use of the Building. The residential care facility operates in a two-story building containing 7 individual residential dwelling units, which are utilized as follows:

Current Uses at 1216 West Balboa Boulevard			
	Bedrooms	Beds/ Room	Beds/ Unit
Lower Level			
Office Unit	N/A	N/A	
Res Unit 1	1	2	2
Res Unit 2	2	2	4
Upper Level			
Res Unit 3	2	2	4
Res Unit 4	1	2	2
Res Unit 5	2	2	4
Res Unit 6	1	2	2
Total Units = 7 (includes office unit)			
Total Bedrooms = 9			
Total Beds = 18			

Parking. The project site contains six (6) off-street parking spaces two (2) of which are located in a carport area and four (4) of which are located in a garage. However, there is a history of the garage area being used as a recreational room for residents of the facility. Use of the garage as a recreational room is a prohibited use. All garages must be available for parking. The NBMC parking requirement for residential group homes is one (1) parking space per three (3) resident beds.

Staffing. In 2008, the applicant reported that eight (8) employees staff the residential facility. Five (5) of these are full-time employees. The residential facility staff includes a

clinical director, program director, case managers, therapists, administrative office staff, night managers, and night staff. Staff members do not reside on the premises.

Client Stays. Typical duration for client stays is a ninety (90) day period divided into three phases. During Phase 1, the first thirty (30) days of client residency, clients are not permitted to have their personal vehicles on-site and are not permitted to leave the facility independently. During Phase 2, the second thirty (30) days of residency, and Phase 3, the final thirty (30) days of residency, clients are permitted to have their personal vehicles on-site and are permitted to leave the facility independently to attend off-site meetings or for recreational purposes.

Curfew and Quiet Hours. The facility reports that it maintains a curfew hour for residents of 10:00 p.m. on weeknights and 11:00 p.m. on weekends. Facility regulations include mandatory quiet hours on the premises between the hours of 10:00 p.m. and 8:00 a.m., every day of the week.

Smoking. Smoking is restricted to a designated area of the facility located within a courtyard which is enclosed on all sides by walls but is open to the sky. Smoking in any other areas of the facility or outside is prohibited.

Treatment Services. Treatment services provided on-site include individual counseling, group counseling, educational sessions, family group sessions, and physical therapy. Family education counseling is conducted on weekends at the facility. Approximately three to four family members attend a two-hour group educational session at one time to learn about alcoholism and drug addiction. Family members park in either the on-site carports or in metered parking spaces on West Balboa Boulevard. The applicant contends that having family members attend "outpatient" counseling sessions is permitted by their ADP license.

Transportation: A van owned and operated by Newport Coast Recovery provides transportation for residents between the off-site service facilities and Newport Coast Recovery. Van routes and schedules are described below:

1. On Tuesday, Saturday, and Sunday evenings between the hours of 7:00 p.m. and 8:30 p.m. van service is provided to and from the Alano Club for weekly meetings. The van route follows Balboa Boulevard westerly from the facility, then north on Newport Boulevard to the Alano Club. The return route follows Newport Boulevard south from the Alano Club then east on Balboa Boulevard to the facility.
2. Approximately one to four times a week, depending on appointment times, van service is provided during the day from the facility to medical offices. The van route follows Balboa Boulevard westerly, then north on Newport Boulevard, then east on Dover Drive to the doctor's office. The return route follows Dover Drive

west to Newport Boulevard, then south on Newport Boulevard, and then east on Balboa Boulevard to the facility.

3. Van service is provided up to 4 times a month during the day to and from the Amen Clinic. Travel times vary depending upon appointment times. The van route follows Balboa Boulevard westerly to Newport Boulevard, north along Newport Boulevard, then east on Westerly Place to the Amen Clinic. The return route follows Westerly Place to Newport Boulevard, then south on Newport Boulevard, and east on Balboa Boulevard to the facility.
4. Van service is provided to a nearby supermarket on Sundays between the hours of 12:00 p.m. and 2:30 p.m. The van route follows West Balboa Boulevard to the Albertson's Supermarket located at 3100 West Balboa Boulevard and returns from the supermarket easterly along West Balboa Boulevard to the facility.
5. Van service is provided to the YMCA on Mondays, Wednesdays, and Fridays between the hours of 2:45 p.m. and 4:15 p.m. The van route follows West Balboa Boulevard to Newport Boulevard then north on Newport Boulevard, then east on University Drive to the YMCA. The return route follows University Drive west to Newport Boulevard, then south on Newport Boulevard to Balboa Boulevard, and then east on Balboa Boulevard to the facility.

Description of Project Setting

The project site is located within an established residential area with a variety of rental and owner-occupied properties consisting of two- and three-unit structures. In addition to the residential uses in the immediate vicinity, Newport Elementary School is located on the south side of West Balboa Boulevard, between 13th Street and 14th Street. A pre-school is also located in close proximity to the property site on the north side of West Balboa at 14th Street. Facilities licensed to sell or serve alcohol located within three blocks of the project site include the American Legion Hall located at 215 15th Street and Fry's market located at 115 15th Street.

Other existing or pending residential group home facilities operating within the vicinity of the project site include:

- Balboa Horizons Recovery Services (1132 West Balboa Boulevard). ADP licensed for eleven (11) residents. Received conditional use permit in December 2008.
- Ocean Recovery (1115 West Balboa Boulevard). ADP-licensed for 22 residents. Received conditional use permit for 18 residents in May 2009.

Ocean Recovery (1217 West Bay Avenue). An ADP license is pending for this "6 and Under" facility for women who are dually-diagnosed with eating disorders and alcohol or drug dependency. This facility is exempt from City regulation per state law.

BACKGROUND

Newport Coast Recovery, LLC been operating the alcohol and drug treatment facility located at 1216 West Balboa Boulevard. since 2001. It holds a license from ADP to provide residential alcohol and drug recovery and treatment services for up to 29 adult males.

In January 2008, the City of Newport Beach adopted Ordinance No. 2008-05. Among other things, this ordinance amended the City's laws regulating unlicensed residential care facilities, and licensed residential care facilities with more than six residents. Under Ordinance No. 2008-05, new licensed residential care facilities with more than six residents, and all unlicensed residential care facilities, may be located in residential districts zoned Multifamily Residential ("MFR") upon issuance of a use permit. With the exception of licensed residential care facilities with six or fewer residents (which may locate in any residential zone), residential care facilities are not permitted in residential districts zoned R-1, R-1.5 or R-2 unless an exception to this restriction is shown to be reasonable, and the exception is necessary to afford disabled individuals an equal opportunity to use and enjoy a dwelling.

Ordinance No. 2008-05 also permitted residential care facilities in existence prior to the ordinance's adoption to apply for a use permit to remain at their current location. Accordingly, Newport Coast Recovery applied for a use permit to remain at its current R-2 location, at a population level of 18 adult males. On December 8, 2008, a public hearing on Newport Coast Recovery's use permit application was conducted by an independent Hearing Officer to review the status of the application and receive testimony from staff, the applicant and the public. Staff indicated that the use permit application could not be deemed complete without substantial further information requested by staff but not yet supplied by the applicant. The Hearing Officer continued the hearing to a date certain, and directed the applicant to provide such information as staff found necessary to deem the application complete. (See Attachment C-Administrative Record for copy a copy of the December 8, 2009 Staff Report)

On January 12, 2009, the hearing for Newport Coast Recovery's use permit application was reopened. Staff recommended that the use permit application be granted, with conditions that staff believed would enable all findings required for granting the use permit to be made. These conditions included a reduction in the resident population to 14 beds, and certain administrative controls on secondhand smoke and offsite parking. (See Attachment C-Administrative Record for a copy of the January 12, 2009 Staff Report)

After hearing testimony from City staff, the applicant and the public, the Hearing Officer determined that all findings required to approve a use permit at the subject location could not be made, and denied the use permit application. (See Attachment C-Administrative Record for a copy of the Resolution of Hearing Officer dated February 4, 2009)

On February 11, 2009, the applicant filed an appeal of the Hearing Officer's decision with the Newport Beach City Council.

On March 25, 2009, the Newport Beach City Manager's Office received a complaint from a resident of Nevada, reporting that she had enrolled her minor son as a resident client at Newport Coast Recovery at 1216 West Balboa Boulevard in Newport Beach, and was not satisfied with the treatment he was receiving or the treatment environment. She reported she had concurrently assisted in enrolling her son's friend, also a minor, at the same facility.

After being informed by City staff that Newport Coast Recovery was not authorized or licensed by either ADP or the Department of Social Services ("DSS") to treat minors, the complainant removed her son from Newport Coast Recovery on or about March 29, 2009. Her son's minor friend remained at the Newport Coast Recovery facility.

On March 26, 2009, City staff reported the complaint to ADP and DSS, and requested an investigation of the allegation that Newport Coast Recovery was treating minors without the required license from the Department of Social Services.

On March 31, 2009, the mother of the remaining minor at Newport Coast Recovery called the Office of the City Attorney and requested assistance in locating her son. She had been told that her son had briefly left the Newport Coast facility with another resident in that resident's private vehicle, relapsed into drug use, and that Newport Coast Recovery had removed her son to a facility at an unknown location in Costa Mesa. City Attorney and City Manager staff worked with the Newport Beach and Costa Mesa Police Departments to locate the minor, who had been placed by Newport Coast Recovery staff in a sober living home for adult males in Costa Mesa. Costa Mesa Police Department officers reported that the minor was scheduled to return to Newport Coast Recovery that night. However, Newport Coast Recovery staff declined to accept the minor's return, stating that they were unauthorized to treat minors. The minor's mother removed him from the Costa Mesa sober living facility on April 1, 2009. (See Attachment C-Administrative Record for a copy of the Memorandum of Dave Kiff, with police report)

On April 1, 2009, DSS Complaint Officer Michael Valentine investigated the allegations and confirmed that Newport Coast Recovery had provided unlicensed care and supervision of minors at 1216 West Balboa Blvd. He issued a Notice of Operation in Violation of Law to Newport Coast Recovery for housing minors without a required license. (See Attachment A-July 7, 2009 Staff Report for Use Permit 2008-033.)

On April 7, 2009, the applicant filed an Application for Reasonable Accommodation with the Newport Beach City Attorney's Office. (Exhibit 1 attached this report.)

On April 14, 2009, the Newport Beach City Council conducted a public hearing on Newport Coast Recovery's appeal of the Hearing Officer's denial of its use permit application. Because of the after-acquired evidence regarding the applicant's violations

of state law, the City Council remanded the use permit application matter to the Hearing Officer for consideration of the after-acquired evidence. (Exhibit 2 - Minutes of the Newport Beach City Council Meeting, April 14, 2009) This hearing is being held concurrently with the hearing on Newport Coast Recovery's application for Reasonable Accommodation.

On June 26, 2009 Assistant City Manager Dave Kiff was contacted by a former resident of Newport Coast Recovery and his father, and received a complaint and report of conditions in Newport Coast Recovery. The former resident reported that while he was a resident of the facility for five days in January 2009, supervision was lax and treatment inadequate. Examples included:

- The resident was able to leave the facility in the evening and not have his absence discovered until approximately 9:00 a.m. the following day;
- The resident was checked into and out of the facility by his friends during his first days in residence. In addition, the resident's father walked into the facility through an open door and roamed the building for some time attempting to locate a staff member at 1:00 p.m.;
- Although the website states that meals would be provided at the facility, no meals were actually provided. Instead, facility residents were given a \$55/week card for Albertson's grocery store;
- Only approximately four or five other clients were in residence at the time, which should have made adequate supervision easier to achieve;
- The resident reports his passport and car title were placed in the facility's safe but said the facility later reported the documents were lost;
- The resident left the facility after five days because there was no effective treatment; he states that a Marriage Family Child Counselor provided approximately 20 minutes of counseling per day, but the rest of the day was unsupervised;
- The resident's father paid \$10,000 in advance, and has been unable to obtain a refund or pro-rated payment for his son's five-day stay.

DISCUSSION

The applicant has made two alternate requests for reasonable accommodation. Staff found the requests, as worded, to be vague and ambiguous, and requested clarification through outside counsel. (Exhibit 3 - Letter of Steven Flower to Steve Polin) Applicant's counsel declined to clarify or amend its request. (Exhibit 4 - Letter of Steve

Polin to Steven Flower) Therefore, staff has done its best to interpret what it believes the applicant is requesting. (Exhibit 5 - Letter of Dave Kiff to Steve Polin, and reply.)

Request No. One: The applicant requests the adoption of the January 12, 2009 staff report and recommendation to conditionally grant a use permit to Newport Coast Recovery. As it is not possible to grant a use permit through the reasonable accommodation process, staff believes that in this first request, the applicant is asking for the right to continue operations at its current location, under the conditions proposed by staff in the January 12, 2009 use permit staff report.¹

Essentially, in Request No. One, the applicant requests an exemption from the provisions of NBMC Section 20.10.020, which prohibits Residential Care, General facilities from operating in residential districts zoned R-2. Since Section 20.10.020 also requires that Residential Care, General facilities operate only under a use permit in certain residential zones, and a use permit had been denied at the time the request was made, the applicant appears also to be requesting an exemption from the use permit requirement. In this request the applicant appeared willing to accept the conditions proposed by staff in the January 12, 2009 staff report.

Request No. Two: Like Request No. One, Request No. Two appears to request an exemption from the restrictions of NBMC Section 20.10.020, which requires that Residential Care, General facilities be located only in MFR zones with a use permit. However, it requests a higher resident population level (18) than it indicates it is willing to accept if Request No. One is granted (14). It also requests a waiver of certain operational standards required to receive a use permit under 20.91A.050, as well as a waiver of requirements not found in NBMC Sections 20.91A.050 or 20.10.020. The standards specified for waiver were among standards which staff felt could be met with conditions in its January 12, 2009 use permit staff report. Staff is puzzled by a dual request that first indicates the proposed conditions are acceptable to the applicant, and then requests that many of those conditions be waived.

The federal Fair Housing Amendments Act (FHAA), adopted in 1988, prohibits housing discrimination based on a resident's disability. Under the FHAA, it is discriminatory for

¹ The conditions recommended in the January 12, 2009 staff report included a bed cap of no more than 14 male clients, nighttime quiet hours, and compliance with federal, state and local laws. They also included a condition that the applicant purchase three master parking permits for on street parking use, and that unless using those permits, no client or staff of Newport Coast Recovery use street parking. To address the intense demand for weekend street parking in beach areas, staff recommended another condition that weekend family counseling and education sessions be held on Sundays between 9:00 a.m. and 12:00 noon, and in the event the applicant sought familial counseling during other times of day, the applicant must provide on-site parking in a manner that does not place resident cars on the street to accommodate non-resident use of the on-site parking, or to shuttle family members of residents visiting for family counseling and education by facility van from a location off the Balboa Peninsula.

government entities to refuse to make reasonable accommodations from rules, policies, and practices when such accommodations may be necessary to afford a person with a disability an equal opportunity to use and enjoy a dwelling (42 U.S.C. § 3604(f)(3)(B)).

Cases interpreting the FHAA have held that a government agency has an affirmative duty to grant a requested reasonable accommodation if: (1) the request is made by or on behalf of a disabled individual or individuals, (2) the accommodation is necessary to afford the disabled applicant an equal opportunity to use and enjoy a dwelling, and (3) the request is reasonable.

Cities may find an accommodation request unreasonable if granting the request would: (1) result in a fundamental alteration in the nature of a City program (often described as undermining "the basic purpose which the requirement seeks to achieve"), or (2) would impose undue financial or administrative burdens on the city (See *U.S. v. Village of Marshall*, 787 F.Supp. 872, 878 (W.D. Wisc. 1991)).

Whether a requested accommodation is reasonable and necessary must be determined on a case-by-case basis.

Analysis – Request No. One

Ordinance No. 2008-05 codified the procedures for requesting, reviewing and granting, conditionally granting, or denying all requests for reasonable accommodation in the City of Newport Beach. The Hearing Officer is designated to approve, conditionally approve, or deny all applications for a reasonable accommodation. The ordinance also established required findings and factors the Hearing Officer may consider when making those findings.

Pursuant to Section 20.98.025(B) of the NBMC, the written decision to approve, conditionally approve, or deny a request for reasonable accommodation shall be based on the following findings, all of which are required for approval.

1. ***Finding: That the requested accommodation is requested by or on the behalf of one or more individuals with a disability protected under the Fair Housing Laws.***

This finding can be made. The applicant submitted a statement that every resident of the facility is in recovery from alcohol and/or drug addiction. Federal regulations and case law have defined recovery from alcoholism and drug addiction as a disability, because it is a physical or mental condition that substantially impairs one or more major daily life activities.

2. ***Finding: That the requested accommodation is necessary to provide one or more individuals with a disability an equal opportunity to use and enjoy a dwelling.***

It is the applicant's burden to demonstrate that the requested accommodation is necessary. "The 'necessary' element requires the demonstration of a direct linkage between the proposed accommodation and the 'equal opportunity' to be provided to the handicapped person." *Lapid-Laurel, LLC v. Zoning Bd. of Adjustment of the Township of Scotch Plains*, 284 F.3d 442, 460 (3rd Cir. 2002).

In the *Lapid-Laurel* case, the court found that the necessity element was established as to disabled elderly residents' need to live in a single-family residential area. The housing provider, however, requested an accommodation for a larger facility than the Township of Scotch Plain's zoning code allowed. The court found that the need for the particular accommodation requested was not demonstrated. The court said for the operator to show necessity for the requested accommodation it would have to show either: 1) the accommodation was necessary for the facility's financial viability (which the court appeared to equate with giving the disabled an equal opportunity to use and enjoy a dwelling), or 2) the requested accommodation was necessary to provide a therapeutic benefit (and thus directly ameliorate an effect of the handicap.) The court found the facility operator had not demonstrated the proposed size of the facility was necessary for either financial viability or therapeutic benefit. 284 F.3d at 460-461.

The Ninth Circuit appears to follow the same approach, requiring an applicant for reasonable accommodation to first show that the accommodation is necessary for financial viability or therapeutic benefit to residents, in order to demonstrate the necessity element of reasonable accommodation. In *City of Edmonds v. Washington State Building Council*, 18 F.3d 802 (9th Cir. 1994), the court noted that a sober living home had made a preliminary showing of necessity because it had shown that it required six or more residents to ensure financial self-sufficiency, and to provide a supportive atmosphere for successful recovery. 183 F.3d at 803.

Consistent with court decisions, the City requires that applicants for reasonable accommodation demonstrate the necessity of reasonable accommodation requests by showing therapeutic benefit to residents (also referred to as "affirmatively enhancing the quality of life" of a disabled individual or individuals), or by showing that the requested number of residents is necessary for the financial viability of the facility.

As to current residents, this finding can be made. The applicant states that individuals in recovery from alcohol or drug addiction need to maintain daily living skills closely related to those that are not addicted and that having a setting of family dwellings surrounding the facility will help maintain sober living and relapse prevention. The applicant states that the reasonable accommodation is necessary because if Newport Coast Recovery is required to cease providing residential treatment services, current residents will lose the housing of their choice. If the Hearing Officer again denies Newport Coast Recovery's use permit application on remand, and the requested accommodation is not granted, the facility will be subject to abatement. The facility

currently houses residents who could be denied housing if abatement proceeds while they are still in residence at the facility.

As to prospective residents, this finding cannot be made. The applicant seeks to provide housing for 14 to 18 residents in a seven-unit apartment building. Potential future residents seeking to live in a licensed recovery facility with 14 to 18 residents in an apartment building have an alternative Ocean Recovery facility serving adult males approximately a block and a half away which has received a use permit to continue operations. In addition, another residential treatment provider, Sober Living by the Sea, operates a substantial number of licensed recovery and treatment facilities housing up to 12 residents in a duplex setting in West Newport. If potential residents of Newport Coast Recovery seek a large licensed recovery environment in Newport Beach, they have an ample supply from which to choose. The City is aware of many similar existing licensed recovery facilities in which housing and treatment for 12 individuals is provided in a duplex building. All of these facilities are surrounded by family dwellings similar to those that surround Newport Coast Recovery, and can provide a similar example of and support for sobriety and daily living skills.

NBMC Section 20.98.025(C) allows the City to consider the following factors in determining whether the requested accommodation is necessary to provide the disabled individual an equal opportunity to use and enjoy a dwelling:

- A. *Whether the requested accommodation will affirmatively enhance the quality of life of one or more individuals with a disability.*

The applicant states that granting the requested accommodation will ameliorate the effects of alcoholism and drug addiction and will provide the residents an opportunity to live alcohol and drug free lives. Living with other individuals in recovery from addiction has been shown to prevent relapse in recovering clients. If the requested accommodation is granted, the applicant's current and potential clients will be able to live in an apartment building in an R-2 District with other individuals in recovery. This is a situation that can affirmatively enhance the quality of life of a person in recovery from addiction, unless overcrowding of the facility or institutionalization of the neighborhood interferes with the residents' re-integration into society.

Although current residents are probably benefited by staying in their current recovery environment for the duration of their intended stay, the applicant has not submitted any information that would demonstrate that prospective residents of the facility will receive any greater therapeutic benefit from residing in the Newport Coast facility than in other available similar facilities. The applicant has also not demonstrated that Newport Coast Recovery offers prospective residents a more equal opportunity to use and enjoy a dwelling than other similar available facilities.

Furthermore, at Newport Coast Recovery's January 12, 2009 use permit hearing, the Hearing Officer determined that allowing more than one such facility within a calculable median block length in a nonstandard subdivision area would create an overconcentration of such uses in the neighborhood, to the detriment of the individuals in recovery at the facility.

Concern about overconcentration is consistent with the position taken by the Department of Housing and Urban Development (HUD) and Department of Justice (DOJ) in their Joint Statement on Group Homes, Local Land Use and the Fair Housing Act. The HUD/DOJ Joint Statement says that, "if a neighborhood came to be composed largely of group homes, that could adversely affect individuals with disabilities and would be inconsistent with the objective of integrating persons with disabilities into the community. Especially in the licensing and regulatory process, it is appropriate to be concerned about the setting for a group home. A consideration of over-concentration could be considered in this context. This objective does not, however, justify requiring separations which have the effect of foreclosing group homes from locating in entire neighborhoods." The City has not prevented group homes from establishing in entire neighborhoods; on the contrary, the Hearing Officer has already granted use permits and reasonable accommodations to two facilities within a two-block area, and two recovery facilities have been permitted within four blocks on either side of Newport Coast Recovery.

HUD and DOJ look with disfavor on laws that require a certain minimum distance between group homes. However, the City's ordinance and the Hearing Officer's determinations do not require a minimum distance between facilities. The distance between facilities, and the number of other facilities on the block, are factors the Hearing Officer shall take into account in considering whether granting a permit will result in overconcentration.

B. Whether the individual or individuals with a disability will be denied an equal opportunity to enjoy the housing type of their choice absent the accommodation.

As to current residents: As stated above, the applicant requests an exception from the requirements of NBMC Section 20.10.020, to allow the continued operation of an existing licensed residential care facility located in an R-2 District, where the NBMC permits such uses only in an MFR District with approval of use permit. As a prohibited use, the facility is subject to abatement. The applicant seeks to continue to house 14 to 18 disabled individuals in seven units of an apartment building. The facility currently houses residents who could be denied housing if abatement proceeds while they are still in residence at the facility.

As to prospective clients: Potential future residents seeking to recover from alcoholism and drug addiction by living in a large licensed recovery facility would

be deprived of an opportunity to live in this particular facility if the use were abated. However, potential future residents would not necessarily be deprived of an opportunity to live in a substantially similar dwelling situation (see discussion in item D below).

- C. *In the case of a residential care facility, whether the requested accommodation is necessary to make facilities of a similar nature or operation economically viable in light of the particularities of the relevant market and market participants.*

The applicant did not provide information or evidence demonstrating that the size or type of facility requested is necessary for the facility's financial viability. Instead, the applicant states in their application that they object to the application requirement to provide an explanation of why the requested accommodation is necessary to make the facility economically viable in light of the relevant market and market participants.

When required findings allow staff to make a recommendation in favor of granting accommodations that would allow facilities to operate at a requested location, but at population level lower than the number of residents requested by the applicant, the facility operator has the opportunity to present financial and other information that demonstrate it needs a higher resident population to be financially viable. In the case of Request No. One, however, Newport Coast Recovery is not requesting a population level that is higher than that which was recommended by staff in its January 12, 2009 use permit staff report. Furthermore, because of the illegal acts of the applicant, staff is unable to make required Finding Four, below. Therefore, staff has not recommended an alternate accommodation, and has no forum for analyzing the financial viability needs of the applicant.

- D. *In the case of a residential care facility, whether the existing supply of facilities of a similar nature and operation in the community is sufficient to provide individuals with a disability an equal opportunity to live in a residential setting.*

The applicant states in their application that they object to the application requirement to provide an explanation of whether the requested accommodation is necessary to provide individuals with a disability an equal opportunity to live in a residential setting by providing evidence regarding the existing supply of facilities of a similar nature and operation in the community.

The Municipal Code authorizes staff to consider other facilities that are of a "similar nature and operation." Based on ADP's most recently published list of licensed facilities (list current as of December 12, 2008) and use permits granted by the Hearing Officer, City staff has prepared a revised estimate of the number

of licensed beds for alcohol and drug recovery in Newport Beach. Including the applicant's ADP license for 29 beds, staff estimates that there are currently approximately 236 ADP-licensed treatment beds in the City, many of which are located in duplex and apartment units on the Balboa Peninsula and in West Newport. Without the applicant's 29 beds, there are still 207 licensed recovery beds in Newport Beach. Like Newport Coast Recovery, the majority of these facilities are located near the beach in residential districts zoned R-2. Operators of other residential alcohol and drug recovery facilities within the City have reported a substantial number of vacant beds which could provide potential Newport Coast Recovery clients with an equal opportunity to live in an alcohol and drug recovery facility in Newport Beach without the requested accommodation. A denial of the reasonable accommodation would not deprive prospective residents of the opportunity of live in a residential setting in Newport Beach.

3. ***Finding: That the requested accommodation will not impose an undue financial or administrative burden on the City as "undue financial or administrative burden" is defined in Fair Housing Laws and interpretive case law.***

With regard to current residents, this finding can be made. Allowing the facility to remain at its current location for a period of time that allows current residents to complete their intended stay would not impose a financial or administrative burden on the City that is undue in relation to requiring disabled residents to leave their present housing.

With regard to prospective residents, this finding cannot be made. Because of the recent questionable acts of the applicant, staff in several City departments has had to spend substantial time assisting complainants and, in one case, locate the minor entrusted to Newport Coast Recovery's care. Staff is concerned that if the operation of the facility is allowed to continue as it is currently structured, the City would continue receiving complaints related to the management of the facility and would need to continue monitoring the facility's operations to prevent repetition of the operator's past violations. Monitoring, investigation, and potential prosecution of complaints or violations by the City would impose an undue financial burden on the City due to the cost associated with such monitoring, investigations, and potential prosecution of any substantiated complaints addressed by the City's Police Department, Code Enforcement Division and legal counsel. Therefore, staff finds that granting the requested accommodation would impose an undue financial or administrative burden on the City.

4. ***Finding: That the requested accommodation will not result in a fundamental alteration in the nature of the City's zoning program, as "fundamental alteration" is defined in Fair Housing Laws and interpretive case law.***

As to current residents, this finding can be made. Most recovery facilities dealing with the City have reported an average length of resident stay of 30 to 90 days. Because of potential hardship to current residents of Newport Coast Recovery's treatment program, staff finds that allowing current residents in treatment to remain at the facility for the remainder of their intended stay will not result in a fundamental alteration in the nature of the City's zoning program.

As to prospective residents, this finding cannot be made. As discussed above, the original staff recommendation was to grant the applicant the right to continue the use under the conditions that the applicant requests in Request No. One. Were it not for the applicant's subsequent verified violation of state law, staff would be able to make the required findings and would recommend granting Request No. One, consistent with its January 12, 2009 recommendation and findings.

However, in March 2009, while its appeal before the City Council was still pending, the applicant violated state law by accepting minor clients without a DSS license or the ADP adolescent waiver required to provide residential treatment, care and supervision to minors. When asked to explain, a member of the applicant's staff told a DSS complaint officer that the facility owner had gotten a waiver from ADP to treat minors. ADP later confirmed via email on April 3, 2009 that it had not granted an adolescent treatment waiver to Newport Coast Recovery. (Exhibit 6; email from Joan Robbins, ADP, to Dave Kiff.)

In addition to the violations of state law, it appears the supervision of resident clients provided by Newport Coast Recovery is currently inadequate to protect facility residents. The supervision provided to a 17-year-old minor resident was so nominal that the minor was able to leave the facility at night and obtain his drug of choice within approximately one week of arrival at Newport Coast Recovery.

Another complainant, a former resident of Newport Coast Recovery, reported to City staff on June 26, 2009 that while he was a resident of the facility for five days in January 2009, supervision was lax and treatment inadequate. Specific examples are listed in the Background section, above. They included allegations of unsupervised residents; the complainant was able to leave the facility in the evening and not have his absence discovered until approximately 9:00 AM the following day, and his father was able to enter the building and walk through without encountering staff or any type of controlled entrance. The resident was checked in and out of the facility by his friends within his first days in residence, presumably a sensitive time in recovery.

In addition, the complainant states that treatment services provided to clients were not as represented. Although the website stated that meals would be provided, they were not. Residents were provided with an Albertson's food card worth \$55 for a week's groceries, and prepared their own meals. The resident left the facility after five days because there was no effective treatment; he states that a Marriage Family Child Counselor provided approximately 20 minutes of counseling per day, but the rest of the

day was unsupervised. For these services, the resident's father paid \$10,000 in advance, and has been unable to obtain a refund or a pro-rated charge for his son's five-day stay.

Staff finds this information extremely troubling, and believes it calls into question the applicant's past representations to the City and City staff and reflects poorly on the applicant's ability to provide a quality treatment program of the current size and type. Staff is also uncomfortable recommending the continued operation of a facility that violated state law and moved a minor with a sensitive medical condition to an unlicensed facility without access to detox facilities, without the means to return home, and without first informing his parents or the relative who placed him in the facility.

In addition, the applicant's violations of state law change staff's recommendations because one of the required findings of NBMC Section 20.91A.060 can no longer be made.

When an applicant requests an exemption from the requirements of NBMC Section 20.10.020, staff analyzes whether granting the requested accommodation would undermine the basic purposes the R-2 zoning district was put in place to achieve, and the purposes the use permit requirements were put in place to achieve. Accordingly, staff will analyze these purposes in relation to Newport Coast Recovery's request.

Zoning District Considerations: NBMC Section 20.10.010 sets forth the basic purposes for establishing zoning districts which include locating residential development in areas which are consistent with the General Plan and with standards of public health and safety established by the Municipal Code, ensuring adequate light, air and privacy for each dwelling, protecting residents from the harmful effects of excessive noise, population density, traffic congestion and other adverse environmental effects, and providing public services and facilities to accommodate planned population and densities. The specific purpose of Section 20.10.010 of the NBMC for the R-2 District is that the district "provides areas for single-family and two-family residential land uses."

Section 20.10.020 of the NBMC establishes those uses that are permitted, conditionally permitted, and prohibited within the R-2 District. In accordance with Section 20.10.020 of the NBMC, Residential Care Facilities, General are not permitted in the R-2 District and are only permitted in the MFR District subject to approval of a use permit.

In the January 12, 2009 staff report, staff found that limiting Newport Coast Recovery's capacity to 14 beds would result in a level of population density that was equivalent to a typical multi-family building occupancy of two persons per unit, and would be more consistent with the residential character of the neighborhood.

Use Permit Considerations: Ordinance No. 2008-05 places regulations on all groups not living as either a single housekeeping unit or a designated "Residential Care Facilities, Small Licensed" in residential districts. The basic purpose of these

regulations is to ensure: (1) the fundamental purposes of the Zoning Code can be achieved; (2) that the adverse secondary impacts created by group residential uses not living as a single housekeeping unit can be mitigated, and; (3) that the adverse secondary impacts that "Residential Care Facilities, General" and "Residential Care Facilities, Small Unlicensed" may have on the surrounding neighborhood can be mitigated. To accommodate the needs of the disabled for housing opportunities, Ordinance No. 2008-05 provides that non-conforming residential care facilities located in residential districts may be allowed to continue operating subject to approval of either a use permit or a request for reasonable accommodation.

The NBMC requires use permits for use classifications typically having operating characteristics that require special consideration, so that they may be located and operated compatibly with uses on adjoining properties and in the surrounding area. NBMC Section 20.91A.010 sets forth the purposes for requiring use permits in residential districts. The first stated purpose is:

...to promote the public health, safety, and welfare and to implement the goals and policies of the Newport Beach General Plan by ensuring that conditional uses in residential neighborhoods do not change the character of such neighborhoods as primarily residential communities.

The second stated purpose is:

... to protect and implement the recovery and residential integration of the disabled, including those receiving treatment and counseling in connection with dependency recovery. In doing so, the City seeks to avoid the overconcentration of residential care facilities so that such facilities are reasonably dispersed throughout the community and are not congregated or over-concentrated in any particular area so as to institutionalize that area.

Staff believes that given the state law violations and facility resident reports of inadequate supervision and treatment programs provided by the applicant, allowing the applicant to continue operating at its current location would undermine one of the basic purposes the use permit requirement was put in place to achieve. Waiving the use permit requirement will not protect and implement the recovery and residential integration of the disabled who are seeking treatment and counseling from chemical dependency. Specifically, staff determined that the use did not conform to all applicable provisions of Section 20.91A.050, (Development and Operational Standards), and in particular, Section 20.91A.050 (h), as discussed below.

(h) No owner or manager shall have any demonstrated pattern of operating similar facilities in violation of the law.

As discussed earlier in this report, the applicant violated California Health and Safety Code Section 1508 when it accepted minor residents for treatment in March 2009. A

license from the Department of Social Services (DSS) and a waiver from the California Department of Alcohol and Drug Programs (ADP) is required to provide care, supervision and treatment to minors, and Newport Coast Recovery had not applied for or received either the license or the waiver.

Due to the applicant's documented violation of state law and inability to effectively supervise the residents, staff believes granting a use permit, or the waiver of a use permit, that allows the facility to continue its current operation would fundamentally alter one of the purposes for requiring use permits for uses in residential districts, which is to protect and implement the recovery and residential integration of the disabled.

NBMC Section 20.91.035(A)(2) requires that the Hearing Officer find that the proposed location of the use seeking a use permit and the proposed conditions under which it will be operated or maintained will be consistent with the General Plan and the purpose of the district in which the site is located, and that it will not be detrimental to the public health, safety, peace, morals, comfort or welfare of persons residing or working in or adjacent to the neighborhood of such use, and will not be detrimental to the general welfare of the city. The General Plan requires that residential care facilities be regulated to the maximum extent allowed by state and federal law. Staff finds that overlooking the recent violations of Newport Coast Recovery and waiving the use permit requirement is not consistent with the provisions of the General Plan. Furthermore, staff finds that with the inadequate resident supervision reported by former residents and neighbors of the facility, waiving the use permit requirement and recommending that Newport Coast Recovery continue operations with 14 to 18 residents would prove detrimental to the health, safety, peace, morals and comfort of the persons residing in and near the facility.

Pursuant to Section 20.98.025(D) of the NBMC, the City may also consider the following factors in determining whether the requested accommodation would require a fundamental alteration in the nature of the City's zoning program:

- A. *Whether the requested accommodation would fundamentally alter the character of the neighborhood.*

Staff analyzed whether granting a use permit to Newport Coast Recovery would fundamentally alter the character of the neighborhood in its January 12, 2009 staff report. The Hearing Officer determined that more than one facility per block could result in an overconcentration of residential care facilities, and noted the operator's inability to adequately control and supervise the facility's residents in a manner that allows the neighbors to have quiet enjoyment of their properties would fundamentally alter the character of the neighborhood.

- B. *Whether the accommodation would result in a substantial increase in traffic or insufficient parking.*

Staff analyzed whether Newport Coast Recovery had sufficient on-site parking for the use and whether traffic and transportation impacts had been mitigated to a level of insignificance in its January 12, 2009 staff report. Staff's analysis has not changed in this area.

- C. *Whether granting the requested accommodation would substantially undermine any express purpose of either the City's General Plan or an applicable Specific Plan.*

General Plan Policy LU 6.2.7 requires the City to regulate day care and residential care facilities to the maximum extent allowed by federal and state law to minimize impacts on residential neighborhoods. The City adopted Ordinance No. 2008-05 to implement General Plan Policy LU 6.2.7. Under the conditions described in the Finding 4 analysis above, staff believes granting the requested accommodation would substantially undermine an express purpose of the General Plan.

- D. *In the case of a residential care facility, whether the requested accommodation would create an institutionalized environment due to the number of and distance between facilities that are similar in nature or operation.*

Staff analyzed whether granting a use permit to Newport Coast Recovery would fundamentally alter the character of the neighborhood by creating an overconcentration of residential care facilities in its January 12, 2009 staff report. With the exception of noting that the Hearing Officer determined that more than one facility per block could result in an overconcentration of residential care facilities which could create an institutionalized environment, staff's analysis has not changed.

5. ***Finding: That the requested accommodation will not, under the specific facts of the case, result in a direct threat to the health or safety of other individuals or substantial physical damage to the property of others.***

This finding can be made. A request for reasonable accommodation may be denied if granting it would pose "a direct threat to the health or safety of other individuals or result in substantial physical damage to the property of others." See 42 U.S.C. § 3604(f)(9). This is a very limited exception and can only be used when, based on the specific facts of a situation, a requested accommodation results in a significant and particularized threat. Federal cases interpreting this exception in the FHAA indicate that requested accommodations cannot be denied due to generalized fears of the risks posed by disabled persons. However, staff makes this finding with reservations, given the lack of supervision the facility appears to have been providing for its disabled residents during recent months.

SUMMARY

In accordance with the provisions of Section 20.98.025 of the NBMC, all five findings must be made in order for the Hearing Officer to approve a request for Reasonable Accommodation.

As to current residents, all five findings can be made.

As to prospective residents, Findings Two, Three and Four cannot be made. Therefore, staff recommends that the Hearing Officer deny Request No. One of Reasonable Accommodation No. 2009-09, and direct staff to prepare a Resolution of Denial, which includes a condition permitting current residents residing in Newport Coast Recovery under a contract to receive treatment services to remain until they choose to leave, or until their original intended stay is complete, whichever occurs first.

Analysis – Request No. Two

If Request No. One is not granted, Newport Coast Recovery seeks a waiver of the following terms and conditions which it states are required by Newport Beach Municipal Code Section 20.91A.050: 1) waiver of occupancy restrictions of two persons per bedroom plus one staff member, and an accommodation of 18 residents; 2) an exemption from parking requirements specified in NBMC Section 20.66.030 and to treat the residents and the visitors of the residents in the same manner as any other resident or visitor to Newport Beach, particularly those requirements that pertain to weekend visitation; 3) treatment of Newport Coast Recovery as a legal nonconforming use and application of any California Building Code provisions that were applicable prior to 2008, since the facility was established prior to 2008; 4) waiver of factors to be considered under NBMC Subsection 20.91A.060(D), phrased by the applicant as "waiver of any 'overconcentration requirements' that is being applied via the American Planning Association guide for Community Residential Facilities;" waiver of any requirements that require an impact analysis of proximity of Newport Coast Recovery to schools, churches, playgrounds and day care centers; and waiver of any requirements that require an impact analysis of the proximity of Newport Coast Recovery to establishments that sell alcoholic beverages.²

As a threshold matter, the Hearing Officer should note that even if they were granted, none of the separately listed accommodations included as part of Request No. Two would be sufficient in and of themselves to allow the applicant to continue operating at

² The applicant misstates the source for some of the requirements, and incorrectly identifies some factors which the Municipal Code establishes as factors to be considered, rather than actual requirements. By listing the requested accommodations as the applicant phrased them, or paraphrasing applicant's requests, staff does not intend to represent that factors which NBMC Section 20.91A.060(D) says shall be considered by the Hearing Officer when considering compatibility with the surrounding neighborhood are requirements in and of themselves.

its present location if the City does not also waive the use permit requirement for nonconforming uses in residential districts. For example, it would not matter if the City granted a waiver of the applicable parking standards if the use permit requirement were not also waived. The applicant would still need a use permit, unless it also obtains a reasonable accommodation from that requirement as well. Staff therefore construes Request No. Two as impliedly containing a request to waive the use permit requirement in addition to the separately listed accommodations it expressly contains.

It should also be noted that two aspects of Request No. Two do not state cognizable reasonable accommodations claims because they are fundamentally at odds with the required legal analysis applicable to reasonable accommodation requests. The applicant has requested that the City waive any consideration of: (1) whether the facility would contribute to an overconcentration of similar facilities; (2) whether the facility's location would be contrary to the APA recommended standard of permitting only one or two such uses per block; and (3) the proximity of the facility to schools, churches, parks, and outlets for alcoholic beverages. The considerations to which the applicant is referring are not prohibitions or standards that stand as absolute bars to granting a use permit for a group home. Rather they are *factors* taken into consideration when determining in the context of a use permit hearing whether the proposed use would be compatible with surrounding uses. More importantly, in the context of a reasonable accommodation request, these factors go directly towards whether a requested accommodation for a residential care facility is reasonable. Courts have recognized that the presence of too many group homes in a residential neighborhood can potentially undermine the very purpose of such a district and therefore be unreasonable. For example, in *United States v. City of Chicago Heights*, 161 F.Supp.2d 819, 837 (N.D.Ill. 2001), the District Court stated:

"There may be situations in which the distance between the homes is so little, where there is already more than one group home within 1000 feet, or where the homes are so similar in nature or operation, under which a request for a special use permit would fundamentally alter the City's purpose of avoiding clustering and preserving the residential character of certain neighborhoods."

Such considerations go directly to whether granting an accommodation for a group home is reasonable under the circumstances and therefore cannot be waived as part of a distinct accommodations request.

Ordinance No. 2008-05 codified the procedures for requesting, reviewing and granting, conditionally granting, or denying all requests for reasonable accommodation in the City of Newport Beach. The Hearing Officer is designated to approve, conditionally approve, or deny all applications for a reasonable accommodation. The ordinance also established required findings, and factors the Hearing Officer may consider when making those findings.

Pursuant to Section 20.98.025(B) of the NBMC, the written decision to approve, conditionally approve, or deny a request for reasonable accommodation shall be based on the following findings, all of which are required for approval.

1. ***Finding: That the requested accommodation is requested by or on the behalf of one or more individuals with a disability protected under the Fair Housing Laws.***

This finding can be made. The applicant submitted a statement that every resident of the facility is in recovery from alcohol and/or drug addiction. Federal regulations and case law have defined recovery from alcoholism and drug addiction as a disability, because it is a physical or mental condition that substantially impairs one or more major daily life activities.

2. ***Finding: That the requested accommodation is necessary to provide one or more individuals with a disability an equal opportunity to use and enjoy a dwelling.***

Occupancy Restriction Waiver: This finding cannot be made. NBMC Section 20.91A.050(C)(2) sets a development and operational standard that requires no more than two residents per bedroom plus one additional resident. The Newport Coast Recovery facility is housed in a seven-unit apartment building. Even if subtracting the bedrooms used for office rather than residential functions, the Newport Coast Recovery facility still provides nine bedrooms. Under the standards of NBMC 20.91A.050(C)(2), this would set the maximum number of residents that a use permit could allow without additional accommodation at 19. Newport Coast Recovery requests a maximum of 18 residents. Therefore, this requested accommodation is not necessary to provide an equal opportunity for disabled residents to reside at Newport Coast Recovery, and will not be analyzed further.

Accommodation of 18 Residents.

It is the applicant's burden to demonstrate that the requested accommodation is necessary. "The 'necessary' element requires the demonstration of a direct linkage between the proposed accommodation and the 'equal opportunity' to be provided to the handicapped person." *Lapid-Laurel, LLC v. Zoning Bd. of Adjustment of the Township of Scotch Plains*, 284 F.3d 442, 460 (3rd Cir. 2002)

Staff originally recommended an occupancy limit of 14 residents, to keep the facility at a size staff believed at the time Newport Coast Recovery could appropriately supervise and control. In Request No. Two, the applicant requests an accommodation of 18 residents. In order to demonstrate necessity for an increased number of residents, the applicant would need to provide evidence showing that: 1) the accommodation is necessary for the facility's financial viability (which courts appear to equate with giving the disabled an equal opportunity to use and enjoy a dwelling), or 2) the requested

accommodation is necessary to provide a therapeutic benefit (and thus directly ameliorate an effect of the handicap.) (For full analysis of this issue, see the analysis for Request No. One, Finding Two, above.) The applicant has not provided evidence to support either argument.

As to current residents, this finding can be made. The applicant states that individuals in recovery from alcohol or drug addiction need to maintain daily living skills closely related to those that are not addicted and that having a setting of family dwellings surrounding the facility will help maintain sober living and relapse prevention. The applicant states that the reasonable accommodation is necessary because if Newport Coast Recovery is required to cease providing residential treatment services, current residents will lose the housing of their choice. If the Hearing Officer again denies Newport Coast Recovery's use permit application on remand, and the requested accommodation is not granted, the facility will be subject to abatement. The facility currently houses residents who could be denied housing if abatement proceeds while they are still in residence at the facility.

As to prospective residents, this finding cannot be made. The applicant seeks to provide housing for 14 to 18 residents in a seven-unit apartment building. The applicant has provided no information or evidence that suggests Newport Coast Recovery requires 18 residents in order to be financially viable. Potential future residents seeking to live in a licensed recovery facility with 14 to 18 residents in an apartment building have an alternative Ocean Recovery facility serving adult males approximately a block and a half away which has received a use permit to continue operations. In addition, another residential treatment provider, Sober Living by the Sea, operates a substantial number of licensed recovery and treatment facilities housing up to 12 residents in a duplex setting in West Newport. If potential residents of Newport Coast Recovery seek a large licensed recovery environment in Newport Beach, they have an ample supply from which to choose. The City is aware of many similar existing licensed recovery facilities in which housing and treatment for 12 individuals is provided in a duplex building. All of these facilities are surrounded by family dwellings similar to those that surround Newport Coast Recovery, and can provide a similar example of and support for sobriety and daily living skills.

Parking Requirements and Visitor Parking Restriction Waivers: This finding cannot be made. The applicant's request to be subject to residential parking standards rather than the parking standards applicable to group homes is not necessary with respect to either current or prospective residents. At the maximum requested resident occupancy of 18 residents, the facility already meets off-street parking requirements established by NBMC Section 20.66.030 for Residential Care Facilities, General. Section 20.66.030 requires one off-street parking spot for every three resident beds. Newport Coast Recovery has the six off-street parking spaces required for 18 resident beds. However, given the history of the garage area as being used for non-parking purposes, the conditions staff proposed on January 12, 2009 recommending that any use permit granted be conditioned on the applicant maintaining the garage area solely for the

purpose of parking vehicles were entirely reasonable. Staff recommends that any accommodation granted to Newport Coast Recovery include a similar condition.

The applicant's request that the Hearing Officer impose no restrictions on visitor parking is also not necessary. Restrictions on visitor parking were originally proposed by staff in conjunction with the applicant's use permit application. The applicant has stated that family members of residents attend a two-hour group educational session to learn about alcoholism and drug addiction. Family members currently park their cars either in the on-site carports which are part of the off-street parking required for residential care facilities under the NBMC, or in metered and unmetered spaces on West Balboa Boulevard. As the proposed conditions were ad hoc conditions on a permit that has not yet been granted, it is doubtful whether this request states a legally distinct reasonable accommodation request. Moreover, the applicant has made no showing that the conditions placed on visitor parking would prevent family members from attending educational sessions at the facility. It has also made no argument or showing that a waiver of the proposed visitor parking conditions in any way hindered the applicant's ability to provide housing and related services to the disabled. Thus, there has been no showing that the requested accommodation is necessary. At most, the applicant has indicated it finds the conditions potentially inconvenient.

Classification of Newport Coast Recovery as a legal nonconforming use: This finding cannot be made. The City has always treated Newport Coast Recovery as a legal nonconforming use in the past, and continues to treat Newport Coast Recovery as a legal nonconforming use under NBMC Section 20.91A.020. Any use in a residential district that was rendered nonconforming by the adoption of Ordinance No. 2008-05 could seek the issuance of a use permit during a certain period of time following the ordinance's effective date. As a use in a residential district rendered nonconforming by the passage of Ordinance No. 2008-05, Newport Coast Recovery was eligible to, and did, apply for a use permit to continue operating at its current location. Staff has processed Newport Coast Recovery's use permit application as it has processed all other applications for permits to continue existing nonconforming uses in residential areas. Therefore, the requested accommodation is not necessary to afford disabled individuals an equal opportunity to use and enjoy a dwelling.

By this request, applicant may be attempting to request a waiver from the application of any conditions imposed by Ordinance No. 2008-05. Besides being inconsistent with the provisions of the NBMC in relation to nonconforming uses in residential districts, this also is not necessary to afford disabled residents an equal opportunity to use and enjoy a dwelling. Disabled individuals do not need such a broad waiver to be able to use and enjoy a dwelling within the City. The appropriate conditions which a use permit or reasonable accommodation can impose are intended to mitigate negative secondary impacts on surrounding residences, but do not prevent disabled individuals from residing in the facility or receiving the services their disability requires in order to remain at the facility and maintain their sobriety.

California Building Code provisions pertaining to life safety – Application of code provisions in effect at the time the facility was established: This finding cannot be made. It is standard procedure, and a requirement of the California Building Code, that when the use of a structure changes from one occupancy type to another, the new occupancy can establish only if the structure can be made to conform to the current Building Code requirements for the new occupancy type. If subsequent code changes create different requirements for that occupancy type, the occupant may choose to make changes to comply with those code requirements, but is not required to do so.

The use of the structure at 1216 West Balboa Boulevard changed in 1997 from an apartment building occupancy to a residential care facility occupancy with more than six residents. The correct version of the California Building Code to apply would be the 1994 California Building Code. In some areas (such as restrictions on openings in walls less than five feet from the property line) the 2008 Building Code is more permissive than earlier codes. Because the 2008 Building Code supplies alternate and equally effective life safety protection provisions, the Newport Beach Fire Marshal is willing to apply the 2008 Building Code rather than the code in effect at the year a facility established. However, this is not a requirement. Therefore, the requested accommodation is not necessary, and will not be analyzed further.

Waiver of factors to consider under NBMC Subsection 20.91A.060(D) – proximity of use to schools, parks, other residential care facilities and alcoholic beverage outlets: This finding cannot be made. The applicant has requested that the City waive any consideration of (1) whether the facility would contribute to an overconcentration of similar facilities in the neighborhood; (2) whether the facility's location would be contrary to the APA's recommended standard of permitting only one or two such uses per block; and (3) the proximity of the facility to schools, churches, parks, and outlets for alcoholic beverages.

As noted above, the considerations to which the applicant is referring are not prohibitions or standards that stand as absolute bars to granting a use permit for a group home. Rather they are *factors* taken into consideration when determining in the context of a use permit hearing whether the proposed use would be compatible with surrounding uses.

In analyzing overconcentration factors, and proximity to schools, parks and alcoholic beverage outlets in a reasonable accommodation setting, staff considers whether a waiver of considering those factors is *necessary* in order to afford disabled individuals an equal opportunity to use and enjoy a dwelling. In other words, staff considers whether, but for the specific factors named by the applicant, disabled individuals would be given an opportunity to reside at Newport Coast Recovery or another similar facility.

All three factors were considered at the January 12, 2009 use permit hearing by the Hearing Officer, who cited overconcentration and proximity to schools and alcoholic beverage outlets among his reasons for denying the applicant's use permit. Therefore,

the applicant may believe that a waiver of these considerations alone would result in a grant of a use permit or reasonable accommodation. However, other facts were also considered by the Hearing Officer, including evidence of persistently disruptive resident behavior, impacts of facility vans, and impacts of secondhand smoke.

Some of the impacts of the latter category could be controlled with appropriate conditions. However, reports of continued disruptive conduct on the part of Newport Coast Recovery's facility residents presented evidence of impacts on neighbors that were not consistent with stated purposes of NBMC Chapter 20.91A - to protect public health, safety and welfare. Staff proposed a reduced occupancy of 14 to allow greater supervision of residents, but the evidence presented at the January 12, 2009 hearing led the Hearing Officer to conclude that Newport Coast Recovery could not adequately control and supervise its facility in a manner that allows neighbors to have quiet enjoyment of their properties. Staff finds that evidence presented after the January 12, 2009 hearing to City staff by former facility residents and/or their parents has confirmed this conclusion. The result for Newport Coast Recovery is that even if the factors which NBMC Section 20.91A.060(D) directs the Hearing Officer to consider are *not* considered, the findings necessary for a use permit still cannot be made. Therefore, the requested waiver is not necessary to provide disabled individuals with an equal opportunity to use and enjoy a dwelling.

NBMC Section 20.98.025(C) allows the City to consider the following factors in determining whether the requested accommodation is necessary to provide the disabled individual an equal opportunity to use and enjoy a dwelling:

- A. *Whether the requested accommodation will affirmatively enhance the quality of life of one or more individuals with a disability.*

Waiver of occupancy restrictions – As the occupancy restrictions pose no barrier to the applicant's ability to house up to 18 residents at the facility, granting the accommodation would not affirmatively enhance the quality of life of an individual with a disability.

Resident occupancy of 18 residents – As discussed above, there are a number of alternate similar housing opportunities for disabled individuals living in a large licensed recovery facility setting, some in the immediate neighborhood of Newport Coast Recovery. Granting the requested accommodation so that potential residents can live in this facility rather than any of the alternate facilities will not affirmatively enhance the quality of life of an individual with a disability.

Parking requirements and visitor parking conditions – As the parking requirements pose no barrier to the applicant's ability to house up to 18 residents at the facility, and applicant has not demonstrated that imposing visitor parking restrictions will prevent residents from receiving a therapeutic benefit, granting

the accommodation would not affirmatively enhance the quality of life of an individual with a disability.

Waiver of factors to consider under NBMC Subsection 20.91A.060(D) – proximity of use to schools, parks, other residential care facilities and alcoholic beverage outlets – As stated above, other factors, such as reports of continued disruptive conduct on the part of the Newport Coast Recovery facility's residents presented evidence of impacts on neighbors that were not consistent with stated purposes of NBMC Chapter 20.91A - to protect public health, safety and welfare. The result for Newport Coast Recovery is that even if the factors which NBMC Section 20.91A.060(D) directs the Hearing Officer to consider in analyzing whether the use will be compatible with the character of the surrounding neighborhood are *not* considered, the findings necessary for a use permit or reasonable accommodation cannot be met. Therefore, the requested waiver would not produce the result desired by the applicant, and would not affirmatively enhance the quality of life of an individual with a disability.

B. Whether the individual or individuals with a disability will be denied an equal opportunity to enjoy the housing type of their choice absent the accommodation.

Waiver of occupancy restrictions - as the occupancy restrictions pose no barrier to the applicant's ability to house up to 18 residents at the facility, no individual with a disability will be denied an equal opportunity to use and enjoy the housing type of their choice absent the accommodation.

Resident occupancy of 18 residents - as discussed above, there are a number of alternate similar housing opportunities for disabled individuals living in a large licensed recovery facility setting, some in the immediate neighborhood of Newport Coast Recovery. Individuals with disabilities will not be denied an equal opportunity to enjoy the housing type of their choice absent the accommodation.

Parking requirements, visitor parking conditions - as the parking requirements pose no barrier to the applicant's ability to house up to 18 residents at the facility, and applicant has not demonstrated that imposing visitor parking restrictions will prevent residents from enjoying the housing type of their choice absent the accommodation, staff finds that individuals with disabilities will not be denied an equal opportunity to enjoy the housing type of their choice absent the accommodation.

Waiver of factors to consider under NBMC Subsection 20.91A.060(D) – proximity of use to schools, parks, other residential care facilities and alcoholic beverage outlets – As stated above, other factors, such as reports of continued disruptive conduct on the part of Newport Coast facility residents presented evidence of impacts on neighbors that were not consistent with stated purposes of NBMC

Chapter 20.91A - to promote public health, safety and welfare. The result for Newport Coast Recovery is that even if the factors which NBMC Section 20.91A.060(D) directs the Hearing Officer to consider are *not* considered, the findings necessary for a use permit or reasonable accommodation cannot be met. Therefore, individuals with disabilities will not be denied an equal opportunity to enjoy the housing type of their choice absent the accommodation.

- C. *In the case of a residential care facility, whether the requested accommodation is necessary to make facilities of a similar nature or operation economically viable in light of the particularities of the relevant market and market participants.*

The applicant did not provide information or evidence demonstrating that the size or type of facility requested is necessary for the facility's financial viability. Instead, the applicant states in their application that they object to the application requirement to provide an explanation of why the requested accommodation is necessary to make the facility economically viable in light of the relevant market and market participants.

When required findings allow staff to make a recommendation in favor of granting accommodations that would allow facilities to operate at a requested location, but at a population level lower than the number of residents requested by the applicant, the facility operator has the opportunity to present financial and other information that demonstrates it needs a higher resident population to be financially viable. In the case of Request No. Two, Newport Coast Recovery is requesting a population level that is higher than that which was recommended by staff in its January 12, 2009 use permit staff report. The applicant declines to provide information about its need for more residents for financial viability reasons, and thus has not carried its burden to demonstrate necessity at the higher occupancy level. Furthermore, because of the violations of state law of the applicant, staff is unable to make required Finding Four, below. Therefore, staff has not recommended an alternate accommodation, and has no forum for analyzing the financial viability needs of the applicant.

The applicant did not present evidence that any of the other accommodations requested in Request No. Two were necessary to make facilities of a similar nature or operation economically viable in light of the particularities of the relevant market and market participants.

- D. *In the case of a residential care facility, whether the existing supply of facilities of a similar nature and operation in the community is sufficient to provide individuals with a disability an equal opportunity to live in a residential setting.*

The applicant states in their application that they object to the application requirement to provide an explanation of whether the requested accommodation is necessary to provide individuals with a disability an equal opportunity to live in a residential setting by providing evidence regarding the existing supply of facilities of a similar nature and operation in the community.

The Municipal Code authorizes staff to consider other facilities that are of a "similar nature and operation." Based on ADP's most recently published list of licensed facilities (list current as of December 12, 2008) and use permits granted by the Hearing Officer, City staff has prepared a revised estimate of the number of licensed beds for alcohol and drug recovery in Newport Beach. Including the applicant's ADP license for 29 beds, staff estimates that there are currently approximately 236 ADP-licensed treatment beds in the City, many of which are located in duplex and apartment units on the Balboa Peninsula and West Newport. Without the applicant's 29 beds, there are still 207 licensed recovery beds in Newport Beach. Like Newport Coast Recovery, the majority of these facilities are located near the beach in residential districts zoned R-2. Operators of other residential alcohol and drug recovery facilities within the City have reported a substantial number of vacant beds, which could provide potential Newport Coast Recovery clients with an equal opportunity to live in an alcohol and drug recovery facility in Newport Beach without the requested accommodation. A denial of the reasonable accommodation would not deprive prospective residents of the opportunity of live in a residential setting in Newport Beach.

3. ***Finding: That the requested accommodation will not impose an undue financial or administrative burden on the City as "undue financial or administrative burden" is defined in Fair Housing Laws and interpretive case law.***

With regard to current residents, this finding can be made. Allowing the facility to remain at its current location for a period of time that allows current residents to complete their intended stay would not impose a financial or administrative burden on the City that is undue in relation to requiring disabled residents to leave their present housing.

With regard to prospective residents, this finding cannot be made. Because of the recent questionable acts of the applicant, staff in several City departments has had to spend substantial time assisting complainants and, in one case, locate the minor entrusted to Newport Coast Recovery's care. Staff is concerned that if the operation of the facility is allowed to continue as it is currently structured, the City would continue receiving complaints related to the management of the facility and would need to continue monitoring the facility's operations to prevent repetition of the operator's past violations. Monitoring, investigation, and potential prosecution of complaints or violations by the City would impose an undue financial burden on the City due to the

cost associated with such monitoring, investigations, and potential prosecution of any substantiated complaints addressed by the City's Police Department, Code Enforcement Division and legal counsel. Therefore, staff finds that granting the requested accommodation would impose an undue financial or administrative burden on the City.

4. ***Finding: That the requested accommodation will not result in a fundamental alteration in the nature of the City's zoning program, as "fundamental alteration" is defined in Fair Housing Laws and interpretive case law.***

This finding cannot be made. Staff recommended granting Request No. One as to current residents, because most recovery facilities dealing with the City have reported an average length of resident stay of 30 to 90 days. Because of potential hardship to current residents of Newport Coast Recovery's treatment program, staff found that allowing current residents in treatment to remain at the facility for the remainder of their intended stay under the conditions incorporated in Request No. One would not result in a fundamental alteration in the nature of the City's zoning program. However, Request No. Two asks for a number of waivers which, if granted, would create a fundamental alteration in the City's zoning program.

In addition, as discussed above, the original staff recommendation on January 12, 2009 was to grant the applicant the right to continue the use under the conditions that the applicant requests in Request No. One. Were it not for the applicant's subsequent verified violation of state law, staff would be able to make the required findings and would recommend granting Request No. One, consistent with its January 12, 2009 recommendation and findings. Because of the applicant's violations of state law, staff is similarly unable to recommend granting Request No. Two, which would require an even higher occupancy limit and fewer controls on secondary impacts. Staff incorporates by reference the discussion of Finding Four in the analysis of Request No. One, above, and finds that it applies to Request No. Two as well.

Waiver of occupancy restrictions – As granting this request is not necessary to afford the maximum requested number of residents the opportunity to use and enjoy the dwelling, unless requested by the Hearing Officer, staff will not engage in an extensive analysis of whether granting the request would result in a fundamental alteration in the nature of the City's zoning program.

Staff notes, however, that reasonable accommodation procedures of NBMC Chapter 20.98 were put in place to provide reasonable accommodations in the City's zoning and land use regulations, policies and practices when *needed* to provide an individual with a disability an equal opportunity to use and enjoy a dwelling. (See NBMC Section 20.98.010, *italics added.*) They were not put in place to provide accommodations that are *not* needed to provide individuals with disabilities an equal opportunity to use and enjoy a dwelling. Therefore, staff contends that granting this accommodation to an

applicant who does not need the accommodation to be able to house the maximum number of occupants it has requested would undermine the basic purpose the reasonable accommodation chapter was put in place to achieve.

Parking requirements and visitor parking conditions waiver - As granting this request is not necessary to afford the maximum requested number of residents the opportunity to use and enjoy the dwelling, unless requested by the Hearing Officer, staff will not engage in an analysis of whether granting the request would result in a fundamental alteration in the nature of the City's zoning program. However, see Factor B analysis of whether granting the requested accommodation would result in a substantial increase in traffic or insufficient parking, below.

Treatment as legal nonconforming use, application of California Building Code provisions in place at time of change of occupancy - As granting this request is not necessary to afford the maximum requested number of residents the opportunity to use and enjoy the dwelling, unless requested by the Hearing Officer, staff will not engage in an analysis of whether granting the request would result in a fundamental alteration in the nature of the City's zoning program.

As noted above, the applicant may believe this request, if granted, would allow it to continue operation without the imposition of reasonable conditions required under a use permit. This is not the case, and the applicant is already being treated as all other nonconforming uses in residential districts are being treated. However, if all provisions of Ordinance No. 2008-05 applicable to this facility were waived, it would result in undermining two of the basic purposes the ordinance was put in place to achieve – promoting public health, safety and welfare, and to implement the policies of the General Plan by ensuring that conditional uses in residential neighborhoods do not change the character of such neighborhoods, and protecting the recovery and residential integration of the disabled (NBMC Section 20.91A.010).

Waiver of overconcentration considerations – Preventing overconcentration and excessive clustering of residential care facilities, so that facilities are not congregated or overconcentrated to the extent of institutionalizing an area, was one of the primary purposes the provisions of the current Zoning Code were put in place to achieve. (See NBMC Section 20.91A.010) Similarly, courts have recognized that the presence of too many group homes in a residential neighborhood can potentially undermine the very purpose of such a district and therefore be unreasonable. In *United States v. City of Chicago Heights*, 161 F.Supp.2d 819, 837 (N.D.Ill. 2001), the District Court stated:

"There may be situations in which the distance between the homes is so little, where there is already more than one group home within 1000 feet, or where the homes are so similar in nature or operation, under which a request for a special use permit would fundamentally alter the City's purpose of avoiding clustering and preserving the residential character of certain neighborhoods."

The HUD/DOJ Joint Statement on Group Homes, Local Land Use and the Fair Housing Act indicates that those agencies are also concerned with the appropriate setting for residential care facilities, and are not in favor of overconcentration that leads to institutionalization of a neighborhood. (See HUD/DOJ Joint Statement on Group Homes, Local Land Use and the Fair Housing Act, quoted in the analysis for Request No. One, Finding Two, above.) Therefore, staff finds that waiving overconcentration considerations entirely is an unreasonable request, as it would undermine one of the basic purposes Ordinance No. 2008-05 was put in place to achieve, and would result in a fundamental alteration of the Zoning Code.

Waiver of considerations of proximity of schools, parks and alcoholic beverage outlets – As the applicant has not demonstrated the necessity of this accommodation, staff will not perform an extensive analysis of the reasonableness of this request unless requested by the Hearing Officer. Staff notes that there *could* be situations in which it would not undermine a basic purpose of the Zoning Code if the Hearing Officer waived consideration of the proximity of nearby schools, parks and alcoholic beverage outlets when reviewing whether a particular proposed use will be compatible with the character of the surrounding neighborhood.

However, staff notes again that factors which the applicant requests not be considered are factors for consideration only. The existence of a potential overconcentration of recovery facilities, or the proximity of schools, parks or alcoholic beverage outlets do not present an automatic bar to the issuance of a use permit or a reasonable accommodation. The Hearing Officer recently issued a reasonable accommodation for a sober living facility which operates in close proximity with a high number of alcoholic beverage outlets in the McFadden Square area of the Balboa Peninsula. The Hearing Officer granted the accommodation in part because that applicant was able to demonstrate that under the circumstances of that facility, the proximity did not undermine the recovery of the disabled residents, and therefore, did not undermine a basic purpose of the use permit requirement.

Pursuant to Section 20.98.025(D) of the NBMC, the City may also consider the following factors in determining whether the requested accommodation would require a fundamental alteration in the nature of the City's zoning program:

- A. *Whether the requested accommodation would fundamentally alter the character of the neighborhood.*

Waiver of occupancy limit, occupancy of 18 residents: As noted above in Request No. One, staff's initial analysis in January 12, 2009 indicated that granting a use permit to the applicant under the conditions proposed by staff would not fundamentally alter the character of the neighborhood. Request No. Two, however, asks for an occupancy level that exceeds the number of residents staff believes the applicant could adequately supervise to prevent a fundamental alteration of the character of the neighborhood. Particularly with the new

information received that demonstrates the applicant's inability to adequately supervise its residents, staff believes granting the requested accommodation would fundamentally alter the character of the neighborhood.

Parking requirements and visitor parking conditions waiver: NBMC Section 20.66.010 establishes the purposes of the off-street parking and loading regulations. They are (A) to ensure that off-street parking and loading facilities are provided for new land uses and major alterations of existing uses in proportion to the need for such facilities created by each use; (B) to establish parking standards for uses consistent with need and with feasibility of providing parking on specific sites; and (C) to ensure that off-street parking and loading facilities are designed in a manner that will ensure efficiency, protect the public safety, and, where appropriate, insulate surrounding land uses from adverse impacts. With the applicant's history of using its off-street parking for uses other than parking, the historically high occupancy of the facility, and the applicant's practice of providing counseling to individuals who do not reside onsite, staff finds that waiving the parking requirements of NBMC Section 20.66.030 would undermine the basic purpose those requirements were put in place to achieve.

Treatment as a legal nonconforming use, application of California Building Code provisions in place at time of change of occupancy: See analysis in Request Two, Finding Four above, in which staff finds that if all provisions of Ordinance No. 2008-05 were waived as to the applicant, the basic purposes the ordinance was put in place to achieve would be undermined. Those purposes include promoting public health, safety and welfare, and to implement the policies of the General Plan by ensuring that conditional uses in residential neighborhoods do not change the character of such neighborhoods, and protecting the recovery and residential integration of the disabled (NBMC Section 20.91A.010).

Waiver of overconcentration requirements: See analysis in Request Two, Finding Four above, in which staff finds that preventing overconcentration that results in the institutionalization of an area was one of the primary purposes Ordinance No. 2008-05 was put in place to achieve. As noted above, courts have recognized that the presence of too many group homes in a residential neighborhood can potentially undermine the very purpose of such a district and therefore be unreasonable. In *United States v. City of Chicago Heights*, 161 F.Supp.2d 819, 837 (N.D.Ill. 2001), the District Court stated:

"There may be situations in which the distance between the homes is so little, where there is already more than one group home within 1000 feet, or where the homes are so similar in nature or operation, under which a request for a special use permit would fundamentally alter the City's purpose of avoiding clustering and preserving the residential character of certain neighborhoods."

Waiver of considerations of proximity of schools, parks and alcoholic beverage outlets: Staff notes that there *could* be situations in which it would not undermine a basic purpose of the Zoning Code if the Hearing Officer waived consideration

of the proximity of nearby schools, parks and alcoholic beverage outlets when reviewing whether a particular proposed use will not fundamentally alter the character of the surrounding neighborhood.

However, staff notes again that factors which the applicant requests not be considered are factors for consideration only. (See the related analysis of this request in Request No. Two, Finding Four, above.)

B. Whether the accommodation would result in a substantial increase in traffic or insufficient parking.

Staff analyzed whether Newport Coast Recovery had sufficient on-site parking for the use and whether traffic and transportation impacts had been mitigated to a level of insignificance in its January 12, 2009 staff report. Staff's analysis and recommendations have not changed in this area. However, that analysis was performed with staff's recommended conditions regarding visitor parking in mind. Staff believes that if Newport Coast Recovery continued operation with 18 residents, and without requirements for the purchase of three master parking permits, requirements that onsite parking be used by facility residents and staff, and visitor parking regulations, a substantial increase in insufficient parking would result.

The visitor parking conditions proposed as part of a use permit could be compared to the requirements the City would place on any other business in a residential district offering outpatient counseling. If an individual residing next door to Newport Coast Recovery wished to conduct outpatient counseling from his or her home, he or she would have to comply with all provisions of the City's home occupation ordinance, NBMC Section 20.60.100. Under NBMC Section 20.60.100, home occupations are permitted as an accessory use of a dwelling if the home occupation is compatible with the residential character of the neighborhood, and if the home occupation is conducted so as not to disturb or cause annoyance to "any reasonable person of normal sensitivity residing in the area." Home occupations are subject to controls and limitations that are more restrictive than those that were proposed for Newport Coast Recovery parking for visitor counseling.

Pursuant to NBMC Section 20.60.100, no home occupation may be open to any visitor without a prior appointment. Employees of home occupations are limited to permanent residents of the dwelling, although independent contractors may make periodic visits. Home occupations may not create pedestrian, automobile or truck traffic significantly in excess of the normal amount in the district. The number of parking spaces available to a dwelling unit housing a home occupation shall not be reduced to less than the number required by Chapter 20.66, Off-Street Parking and Loading and any relevant provisions for nonconforming parking found in NBMC Section 20.62.050. The off-street parking requirements

in the R-2 District where the Newport Coast Recovery facility is located are two off-street parking spaces per dwelling unit. In contrast, staff's single recommendation that parking arrangements be made for non-residents who visit Newport Coast Recovery to receive counseling and education services appear substantially less restrictive.

- C. *Whether granting the requested accommodation would substantially undermine any express purpose of either the City's General Plan or an applicable Specific Plan.*

General Plan Policy LU 6.2.7 requires the City to regulate day care and residential care facilities to the maximum extent allowed by federal and state law to minimize impacts on residential neighborhoods. The City adopted Ordinance No. 2008-05 to implement General Plan Policy LU 6.2.7.

Waiver of occupancy restrictions - Under the conditions described in the Finding Four analysis above, staff believes granting the requested accommodation would substantially undermine an express purpose of the General Plan.

Waiver of overconcentration requirements: In addition to the analysis above, see analysis in Request Two, Finding Four above, in which staff finds that preventing overconcentration that results in the institutionalization of an area was one of the express purposes Ordinance No. 2008-05 was put in place to achieve.

- D. *In the case of a residential care facility, whether the requested accommodation would create an institutionalized environment due to the number of and distance between facilities that are similar in nature or operation.*

Staff analyzed whether granting a use permit to Newport Coast Recovery would fundamentally alter the character of the neighborhood by creating an overconcentration of residential care facilities in its January 12, 2009 staff report. With the exception of noting that the Hearing Officer determined that more than one facility per block could result in an overconcentration of residential care facilities, staff's analysis has not changed.

5. ***Finding: That the requested accommodation will not, under the specific facts of the case, result in a direct threat to the health or safety of other individuals or substantial physical damage to the property of others.***

This finding can be made. A request for reasonable accommodation may be denied if granting it would pose "a direct threat to the health or safety of other individuals or result in substantial physical damage to the property of others." See 42 U.S.C. § 3604(f)(9). This is a very limited exception and can only be used when, based on the specific facts of a situation, a requested accommodation results in a significant and particularized

threat. Federal cases interpreting this exception in the FHAA indicate that requested accommodations cannot be denied due to generalized fears of the risks posed by disabled persons. However, staff makes this finding with caution and reservations, given the lack of supervision the facility appears to have been providing for its disabled residents during recent months.

SUMMARY

In accordance with the provisions of Section 20.98.025 of the NBMC, all five findings must be made in order for the Hearing Officer to approve a request for Reasonable Accommodation. Findings Two, Three and Four cannot be made. Therefore, staff recommends that the Hearing Officer deny Request No. Two.

CONCLUSION

In conclusion, staff recommends that the Hearing Officer:

1. Deny Request for Reasonable Accommodation No. RA2009-09;
2. Direct staff to prepare a Resolution of Denial with Prejudice for Request No. One and No. Two of Reasonable Accommodation No. 2009-09, which includes a condition permitting current residents residing in Newport Coast Recovery under a contract to receive treatment services to remain until they choose to leave, or until their original intended stay is complete, whichever occurs first, and present the Resolution to the Hearing Officer for review and adoption at a time and date set by the Hearing Officer.

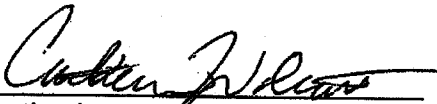
Environmental Review

This activity has been determined to be categorically exempt under the requirements of the California Environmental Quality Act under Class 1 (Existing Facilities). This class of projects has been determined not to have a significant effect on the environment and is exempt from the provisions of CEQA. This activity is also covered by the general rule that CEQA applies only to projects that have the potential for causing a significant effect on the environment (Section 15061(b)(3) of the CEQA Guidelines. It can be seen with certainty that there is no possibility that this activity will have a significant effect on the environment and therefore it is not subject to CEQA.

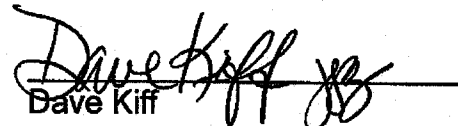
Public Notice

Notice of this hearing was published in the Daily Pilot, mailed to property owners and occupants within 300 feet of the property and posted at the site a minimum of 10 days in advance of this hearing consistent with the Municipal Code. Additionally, the item appeared upon the agenda for this meeting which was posted at City Hall and on the City website.

Prepared by:


Catherine Wolcott
Deputy City Attorney

Submitted by:


Dave Kiff
Assistant City Manager

EXHIBITS

1. Reasonable Accommodation Application
2. City Council Meeting Minutes of April 14, 2009
3. Correspondence from City's Counsel to Applicant
4. Correspondence from Applicant's Counsel to Staff
5. Correspondence from City Staff to Applicant's Counsel and Reply
6. E-mail from J. Robbins of ADP to D. Kiff

Exhibit No. 1
Reasonable Accommodation Application

STEVEN G. POLIN, ESQ.
Attorney At Law

3034 TENNYSON ST. N.W.
WASHINGTON, D.C. 20015

TEL (202) 331-5848
FAX (202) 537-2986
SPOLIN2@EARTHLINK.NET

April 7, 2009

SENT VIA ELECTRONIC MEANS AND FIRST CLASS MAIL

David R. Hunt
City Attorney
City of Newport Beach
3300 Newport Blvd
Newport Beach, CA 92658-8915

RE: Newport Coast Recovery, LLP
Reasonable Accommodation Request

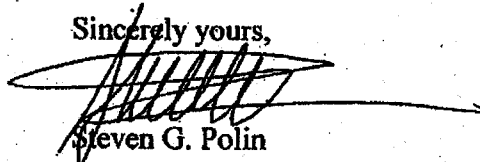
Dear Mr. Hunt,

Please find attached a request for a reasonable accommodation submitted pursuant to NBMC §20.98.020 on behalf of my client, Newport Coast Recovery, LLP.

Newport Coast Recovery believes that this reasonable accommodation request substantively affects the consideration of the City Council of its appeal from the denial of its application of the Use Permit in Appeal No. A09-00397, and if granted would render the appeal moot. Therefore, Newport Coast Recovery is requesting that Appeal No. A09-00397 be taken off the agenda of the City Council on April 14, 2009 so that its request for a reasonable accommodation can be processed by the City Staff. It is our position that since the City is currently in possession of all the necessary information necessary to process the request for a reasonable accommodation so that a hearing can be expeditiously scheduled before the Hearing Officer.

Thank you for your consideration of this request.

Sincerely yours,



Steven G. Polin

cc: Newport Coast Recovery, LLP
T. Peter Pierce
Christopher Brancart
Dave Kiff
Catherine Wolcott
Paul E. Smith
Dana Mulhauser



CITY OF NEWPORT BEACH

Supplemental Information for Reasonable Accommodation for Providers of Housing

Planning Department
3300 Newport Boulevard
Newport Beach, California 92658-8915
(949) 644-3200

Application Number _____

If you are a provider or developer or provider of housing for individuals with a disability and are seeking a reasonable accommodation, please provide the following information with regard to your request. If you have already submitted this information to the City in conjunction with a different application, you can submit copies of the information previously provided.

A. Your Firm's Current Uses. Do you or your firm (or any entity or person affiliated with you or your firm) currently operate, manage, or own other group residential uses in Newport Beach?

☐ Yes ☐ No

If yes, cite address(es) of facility(ies) (attach more pages if necessary):

EXAMPLE:

1234 Main Street, Newport Beach	Unlicensed "Sober Living"	7
Site Address	Type of Use	Bed
Capacity		
Site Address	Type of Use	Bed
Capacity		
Site Address	Type of Use	Bed
Capacity		
Site Address	Type of Use	Bed
Capacity		
Site Address	Type of Use	Bed
Capacity		

B. Other Similar Uses. What uses, not operated by or affiliated with you or your firm, are of a similar type as your proposed use here in Newport Beach? Please cite address(es) of facility(ies) (attach more pages if necessary):

EXAMPLE:

1234 Main Street, Newport Beach	Unlicensed "Sober Living"	7
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Site Address	Type of Use	Bed
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Capacity		
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____ See Use Permit Application and Staff Report prepared in connection with the Use Permit application. See PA 2008-104 for UP 2008-033

Site Address	Type of Use	Bed
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Capacity		
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Site Address	Type of Use	Bed
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Capacity		
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Site Address	Type of Use	Bed
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Site Address	Type of Use	Bed
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Site Address	Type of Use	Bed
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Capacity		
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Site Address	Type of Use	Bed
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CITY OF NEWPORT BEACH

Request for Reasonable Accommodation Supplemental Information Required

Planning Department
3300 Newport Boulevard
Newport Beach, California 92658-8915
(949) 644-3200

Application Number _____

To aid staff in determining that the necessary findings can be made in this particular case as set forth in Chapter 20.98 of the Municipal Code, please answer the following questions with regard to your request (Please attach on separate sheets, if necessary):

Newport Coast Recovery, LLP

Name of Applicant

Newport Coast Recovery, LLP

If provider of housing, name of facility, including legal name of corporation

1216 West Balboa Blvd, Newport Beach, CA 92661

(Mailing Address of Applicant)

(City/State)

(Zip)

949-723-3155

949-673-3098

(Telephone)

(Fax number)

mnewman1960@hotmail.com

(E-Mail address)

1216 West Balboa Blvd, Newport Beach, CA

047-234-14

(Subject Property Address)

Assessor's Parcel Number (APN)

1. Is this application being submitted by a person with a disability, that person's representative, or a developer or provider of housing for individuals with a disability?

Newport Coast Recovery, LP is licensed by the California Department of Alcohol and Drug Programs to operate and maintain an adult residential or recovery treatment facility for men in recovery from alcoholism and substance abuse.

2. Does the applicant, or individual(s) on whose behalf the application is being made, have physical or mental impairments that substantially limit one or more of such person's major life activities? If so, please state the impairment(s) and provide documentation of such impairment(s).

All residents of Newport Coast Recovery are recovering alcoholics and substance abusers. For additional documentation please refer to the Use Permit Application submitted by Newport Coast Recovery as well as the Staff report prepared in connection with the use permit application. (See PA 2008-104 for UP 2008-033).

3. From which specific Zoning Code provisions, policies or practices are you seeking an exception or modification?

Dev. & Ops Standards

Newport Coast Recovery is located in an area zoned R-2 and is seeking as a reasonable accommodation the adoption of the Staff report and recommendation (PA 2008-104 for UP 2008-033) that was rejected in its entirety by the Hearing Officer. In the alternative, Newport Coast Recovery is seeking a waiver of the following terms, conditions, policies or procedures required by NBMC Section 20.91A.050: waiver of the occupancy restriction of two persons per bedroom plus one staff member and that an accommodation of 18 residents be made; parking requirements that treats the residents and the visitors of the residents in the same manner as any other resident or visitor to Newport Beach, particularly those requirements that pertain to weekend visitation; treatment of Newport Coast Recovery as a legal nonconforming use and application of any fire code provisions pursuant to the California Building Code that were applicable prior to 2008 in as much Newport Coast Recovery has used the dwelling as a licensed residential treatment center since 2002 at its present location; waiver of any "overconcentration requirements" that is being applied via the American Planning Association guide for Community Residential Facilities; waiver of any requirements that require an impact analysis of the proximity of Newport Coast Recovery to schools, churches, playgrounds and day care centers; and, waiver of any requirements that require an in impact analysis of the proximity of Newport Coast Recovery to establishments that sell alcoholic beverages.

4. Please explain why the specific exception or modification requested is necessary to provide one or more individuals with a disability an equal opportunity to use and enjoy the residence. Please provide documentation, if any, to support your explanation.

Newport Coast Recovery has been providing residential treatment services at 1216 West Balboa Blvd. since 2002. It is licensed by the California Department of Alcohol and Drug Programs for 29 beds. The accommodation sought by Newport Coast Recovery would be for the City to permit it to continue its services at 1216 West Balboa for a maximum of 18 beds. Unless the requested accommodation is granted Newport Coast Recovery will be required to cease providing residential treatment services, and those current residents will lose the housing of their choice and prospective residents will be denied an opportunity to live in the housing of their choice. The granting of the requested accommodation will ameliorate the effects of alcoholism and drug addiction and will provide the residents an opportunity to live alcohol and drug free lives, which in turn means that not only does the benefit befall the individual, but the community gains individuals who will become responsible, productive members of society. Individuals living a sober lifestyle must learn to respond appropriately to situations where there is the presence of alcohol, and where alcohol is available during the course of daily activities. In our society the availability and presence of alcohol is ingrained and can be found in the most innocuous places. The City cannot legislate or require as a condition of receiving a use permit the proximity of a facility such Newport Coast Recovery to establishments that sell alcoholic beverages. Likewise, the City cannot legislate or require in its analysis the proximity of a facility such

as Newport Coast Recovery to churches, schools, playgrounds or daycares without specific evidence that the residents of Newport Coast Recovery poses a direct threat to the safety of the those facilities, the property of those facilities or the individuals that use those facilities.

5. Please explain why the requested accommodation will affirmatively enhance the quality of life of the individual with a disability. Please provide documentation, if any, to support your explanation.

Newport Coast Recovery has been providing residential treatment services at 1216 West Balboa Blvd. since 2002. It is licensed by the California Department of Alcohol and Drug Programs for 29 beds. The accommodation sought by Newport Coast Recovery would be for the City to permit it to continue its services at 1216 West Balboa for a maximum of 18 beds. Unless the requested accommodation is granted Newport Coast Recovery will be required to cease providing residential treatment services, and those current residents will lose the housing of their choice and prospective residents will be denied an opportunity to live in the housing of their choice. The granting of the requested accommodation will ameliorate the effects of alcoholism and drug addiction and will provide the residents an opportunity to live alcohol and drug free lives, which in turn means that not only does the benefit befall the individual, but the community gains individuals who will become responsible, productive members of society. Individuals living a sober lifestyle must learn to respond appropriately to situations where there is the presence of alcohol, and where alcohol is available during the course of daily activities. In our society the availability and presence of alcohol is ingrained and can be found in the most innocuous places. The City cannot legislate or require as a condition of receiving a use permit the proximity of a facility such Newport Coast Recovery to establishments that sell alcoholic beverages. Likewise, the City cannot legislate or require in its analysis the proximity of a facility such as Newport Coast Recovery to churches, schools, playgrounds or daycares without specific evidence that the residents of Newport Coast Recovery poses a direct threat to the safety of the those facilities, the property of those facilities or the individuals that use those facilities.

6. Please explain how the individual with a disability will be denied an equal opportunity to enjoy the housing type of their choice absent the accommodation? Please provide documentation, if any, to support your explanation.

Newport Coast Recovery has been providing residential treatment services at 1216 West Balboa Blvd. since 2002. It is licensed by the California Department of Alcohol and Drug Programs for 29 beds. The accommodation sought by Newport Coast Recovery would be for the City to permit it to continue its services at 1216 West Balboa for a maximum of 18 beds. Unless the requested accommodation is granted Newport Coast Recovery will be required to cease providing residential treatment services, and those current residents will lose the housing of their choice and prospective residents will be denied an opportunity to live in the housing of their choice. The granting of the requested accommodation will ameliorate the effects of alcoholism and drug addiction and will provide the residents an opportunity to live alcohol and drug free lives, which in turn means that not only does the benefit befall the individual, but the community gains individuals who will become responsible, productive members of society. Individuals living a sober lifestyle must learn to respond appropriately to situations where there is the presence of alcohol, and where alcohol is available during the course of daily activities. In our society the availability and presence of alcohol is ingrained and can be found in the most innocuous places. The City

cannot legislate or require as a condition of receiving a use permit the proximity of a facility such as Newport Coast Recovery to establishments that sell alcoholic beverages. Likewise, the City cannot legislate or require in its analysis the proximity of a facility such as Newport Coast Recovery to churches, schools, playgrounds or daycares without specific evidence that the residents of Newport Coast Recovery poses a direct threat to the safety of the those facilities, the property of those facilities or the individuals that use those facilities.

7. If the applicant is a developer or provider of housing for individuals with a disability, please explain why the requested accommodation is necessary to make your facility economically viable in light of the relevant market and market participants. Please provide documentation, if any, to support your explanation.

Newport Coast Recovery objects to this request. An applicant for a request for a reasonable accommodation is not required to compare or make an assessment of economic viability in light of the relevant market and market participants. Accordingly, Newport Coast Recovery is not required to obtain economic data concerning the relevant market and market participants in order for this request to be considered and granted.

8. If the applicant is a developer or provider of housing for individuals with a disability, please explain why the requested accommodation is necessary for your facility to provide individuals with a disability an equal opportunity to live in a residential setting taking into consideration the existing supply of facilities of a similar nature and operation in the community. Please provide documentation, if any, to support your explanation.

Newport Coast Recovery objects to this request. An applicant for a reasonable accommodation is not required to assess whether a request for a reasonable accommodation is necessary to provide persons with disabilities an equal opportunity to live in a residential setting by providing evidence regarding the existing supply of facilities of a similar nature and operation in the community. Without waiving this objection, see the Answer to Number 4

9. Please add any other information that may be helpful to the applicant to enable the City to determine whether the findings set forth in Chapter 20.98 can be made (Use additional pages if necessary.)

Newport Coast Recovery is licensed by the State of California's Department of Alcohol and Drug Programs to provide residential treatment services for up to 29 men. It has been doing so at its present location since 2002.

Exhibit No. 2

**City Council Meeting Minutes of April 14,
2009**

CITY OF NEWPORT BEACH

City Council Minutes
Regular Meeting
April 14, 2009 – 7:00 p.m.

I. **STUDY SESSION - 4:00 p.m.**

II. **CLOSED SESSION - 5:18 p.m.**

A. **Conference with Legal Counsel - Existing Litigation (Government Code § 54956.9(a)); Six matters:**

1. **Concerned Citizen's v. City of Newport Beach, U.S. District Court Case No. SACV 08-00192-JVS (RNBx)**
2. **Pacific Shores v. Newport Beach, U.S. District Court Case No. SACV 08-00457 AG (PLx)**
3. **Sober Living By The Sea v. City of Newport Beach, U.S. District Court Case No. SACV 08-00200 JVS (RNBx)**
4. **City of Newport Beach v. Morningside Recovery, Orange County Superior Court Case No. 07CC11694**
5. **Pacific Shores v. Newport Beach, U.S. Department of Housing and Urban Development - California - Investigation No. 09-08-0592-8; U.S. Department of Justice Investigation No. 09-08-0592-8**
6. **Newport Coast Recovery v. City of Newport Beach, Housing and Urban Development - California - Investigation No. 09-09-0713-8**

B. **Conference with Legal Counsel - Anticipated Litigation - Exposure to Litigation (Government Code § 54956.9(b)); One matter:**

1. Potential exposure to litigation based upon specific facts and circumstances arising out of the denial of Newport Coast Recovery, LLC's application for a Use Permit.

C. **Conference with Legal Counsel - Anticipated Litigation - Initiation of Litigation (Government Code § 54956.9(c)); One matter:**

1. Potential initiation of litigation against the City of Irvine for violation of the Brown Act and the California Environmental Quality Act when adopting regulation changes in the Irvine Business Complex regarding Accessory Business Uses.

D. **Public Employee Performance Evaluation (Government Code § 54957(b)(1));**

Title: City Manager

E. Conference with Labor Negotiators (Government Code § 54957.6):

Agency Designated Representatives: Terri Cassidy, Human Resources Director

Employee Organization: Lifeguard Management Association

III. RECESS

IV. RECONVENED AT 7:00 P.M. FOR REGULAR MEETING

V. ROLL CALL

Present: Council Member Henn, Council Member Rosansky, Mayor Pro Tem Curry, Mayor Selich, Council Member Webb, Council Member Gardner, Council Member Daigle

VI. CLOSED SESSION REPORT

Regarding Closed Session Item C-1, City Attorney Hunt reported that Council authorized outside counsel to file suit against the City of Irvine regarding the Irvine Business Complex's accessory business uses.

VII. PLEDGE OF ALLEGIANCE - Council Member Daigle

VIII. INVOCATION - Frank Carpenter

IX. PRESENTATIONS

Presentation by the Volunteers in Policing (VIP) in Recognition of Achieving the \$1 Million Mark With of Volunteer Hours - Police Chief Klein introduced the police volunteers and Malcolm Reid presented Mayor Selich with a check for \$1 million worth of volunteer hours.

Eco-Fabulous Event Sponsorship by Inside the Outdoors Foundation - Meghan Barron and Ana Rothwell invited residents to attend the Eco-Fabulous Fashion Show and Lifestyle Event on May 9 at the Newport Coast Community Center.

Jeremy Piasecki, Head Coach, Afghanistan National Water Polo Team utilized a PowerPoint presentation that included the history, goals, vision, growth, partnership, hosting opportunities and benefits of hosting the team. He suggested that residents visit www.afghanistanwaterpolo.com for more information.

XV. PUBLIC HEARINGS

20. APPEAL OF HEARING OFFICER'S DENIAL OF USE PERMIT (UP2008-033) - 1216 WEST BALBOA BOULEVARD (NEWPORT COAST RECOVERY) (PA2008-104) (continued from 3/24/09). [100-2009]

City Attorney Hunt stated that the hearing tonight is for Council to review the record and make a determination as to whether there is substantial evidence to support the Hearing Officer's findings. He noted that the evidence acquired after the close of the hearing is not admissible and cannot be considered by Council in making a determination on the appeal; however, if the evidence could not be reasonably presented during the hearing and is relevant, Council has the option to remand it back to the Hearing Officer for consideration.

Chris Brancart, attorney for the appellant, asked Council to vacate the Hearing Officer's decision and recommended that the use permit be granted with a 14 bed limit.

He expressed the opinion that the newly acquired evidence should not be remanded to the Hearing Officer because there is no substantial evidence as to the adverse impacts and only speculation based on discriminatory stereotypes and anecdotes was presented.

Assistant City Manager Kiff believed that the Hearing Officer formulated his findings based on substantial evidence listed in the record.

Kit Bobko, outside counsel, discussed the evidence that was presented to the Hearing Officer and believed that the evidence is not anecdotal. He urged Council to remand the newly acquired evidence to the Hearing Officer and stated that the Hearing Officer is the appropriate person to hear the newly acquired evidence. He indicated that the issue is a land use issue.

Mayor Selich opened the public hearing.

Dick Nichols stated that the facility is integral due to its size, expressed concern about the closeness to schools, and noted that there is an overconcentration of group homes in the area.

Larry Mathena indicated that the evidence presented at the hearing included a video, petitions, the number of facilities in the area, and ongoing complaints.

Louise Fundenberg, President of the Central Balboa Community Association, urged Council to deny the use permit.

Denys Oberman stated that there is an overconcentration of facilities on the Peninsula, provided addresses of the group homes in the area, and noted that there are four facilities within 300 feet of each other. She summarized evidence that was documented to the Hearing Officer but was not included in the staff report.

Sarah Abraham asked Council to consider the citizens and homeowners in the area.

Mustafa Soylemez believed that there is overconcentration in the area.

Mr. Brancart stated that overconcentration does not constitute a finding that would justify denying a use permit and believed that the Hearing Officer is not the correct person to decide the newly acquired evidence. He asked Council to vacate the Hearing Officer's decision and to approve staff's original recommendation to allow a 14 bed facility.

Mayor Selich closed the public hearing.

Jim Markman, outside counsel for the City, recommended that Council remand only the newly acquired evidence on the basis that the applicant be given the opportunity to explain, disagree, or rebut the information. He stated that the Hearing Officer can judge it and decide whether to include it in a resolution, and then the item can be brought back to Council for consideration of the appeal.

In response to Council Member Henn's question, City Attorney Hunt clarified that Council needs to consider all of the evidence from the hearing.

Motion by Council Member Henn to remand the matter to the Hearing Officer to only consider the newly acquired evidence.

The motion carried by the following roll call vote:

Ayes: Council Member Henn, Council Member Rosansky, Mayor Pro Tem Curry, Mayor Selich, Council Member Webb, Council Member Gardner, Council Member Daigle

XVII. CONTINUED BUSINESS

22. NEW CITY HALL AND PARK PROJECT: CONSIDERATION AND APPROVAL OF CONCEPT DESIGN, DIRECTION FOR SCHEMATIC DESIGN PHASE [100-2009]

Assistant City Manager Kiff introduced the design team and noted that an additional handout was provided tonight.

Greg Mottola and Sarah Kuehl, Bohlin Cywinski Jackson, utilized a PowerPoint presentation to illustrate the updated site plan, landscaping, view plane, garage parking, circulation, event capacity, entry points, park amenities, parking, the dog park, existing topography, the library expansion, lighting, and the initial floor plan.

In response to Council questions, Assistant City Manager Kiff and Mr. Mottola stated that staff has not considered automated parking, noted that half of the garage parking is covered with a trellis to shield the entire view of the deck and possibly mitigate the headlight glare from cars, provided information on different types of lighting fixtures, stated that a dog park would need to be fenced, highlighted the location of the grass meadow and natural areas, stated that there are no guidelines for dog parks but there are different elements to consider relative to maintenance and aesthetics, and reported that the current recommendation does not include a restroom on the north side of the park but does include restroom access from the outside of the community room.

Robert Shaver, CW Driver, stated that the cost estimate for the roof trellis is \$2 million.

Council Member Daigle thanked staff and the design team for their hard work and stated that it is important that the resident concerns are addressed. Council Member Gardner stated that the cost is consistent with the proposed amount and believed that the budget breakdown should be made clear.

Council Member Henn raised reservations about the increase in the cost since the inception of the project. He believed that spending this amount of money for the project could cause deferral of other projects of equal importance to residents. He asked if the design of the building is based on the current conceptual plan and whether there will be an opportunity to reconsider some of the project elements. Mayor Selich stated that the schematic design phase will start in the fall and some of the elements can be phased or removed at that time, and that cost reduction opportunities will be considered. Council Member Webb believed that the structure will be used for at least 50 years, there needs to be expansion opportunities, and it is not wise to restructure the new City Hall to meet a dollar amount versus meeting the needs of the community.

In response Council Member Rosansky's questions, City Manager Bludau stated that the Facilities Financing Plan is predicated on the economy, estimates, and different project costs. Mayor Pro Tem Curry noted the policy that uses a percentage of the General Fund budget for capital improvement projects. He agreed that the City Hall and park project could end up deferring projects like Sunset Ridge Park, Marina Park, the new police station, and the Corona del Mar library.

Mayor Selich opened the public hearing.

Barry Allen expressed concern about the newly added elements. He urged Council to build the park and City Hall at the same time and not phase the project.

Dick Nichols expressed concern about traffic circulation, the accessibility to the parking structure, and that City Hall will not be visible from the street.

Denise Woltmath expressed appreciation for the changes that assist with maintaining the view plane, asked Council to continue monitoring the lighting, and believed that City Hall and the park should be built at the same time.

Debra Allen expressed appreciation for the protection of the view plane and suggested that the area be designed to be people-friendly.

Ron Hendrickson expressed appreciation for the progress, stated that the cost concerns that Council Member Henn expressed are appropriate, believed that an orientation process for Council is needed, noted that the library expansion is important, and indicated that current building costs are low.

Karen Tringali stated that it is imperative that needs are balanced, thanked Council and staff for allowing residents to provide input and feedback, and asked Council not to phase the project.

Jan Vandersloot expressed appreciation to the designers for being responsive to community input.

Rush Hill stated that the importance of approving the conceptual plan is to move forward with the Environmental Impact Report (EIR). He noted that there are adequate opportunities for changes during the schematic design phase and indicated that it will be expensive if changes are done during the design development phase.

In response to Council Member Henn's questions, Mr. Hill stated that the time needed for refinements depends on various elements. He added that project costs will differ according to project square footage, details, and methods used. He urged Council not to limit evaluation opportunities at this time.

Laura Curran expressed concern about the number of private office spaces being proposed and questioned the need for a dog park.

Mayor Selich closed the public hearing.

Mayor Selich suggested that the Building Committee take another look at office space sizes, usage, circulation, public counters, and entries, as well as overall value engineering of the project. Council Member Henn offered to contribute to the process by forwarding the Building Committee his specific concerns and issues.

Motion by Council Member Gardner to a) approve the proposed Concept Design for the City Hall and Park Project, as proposed; b) direct the Building Committee to take another look at the use of the office space for sizes, usage, and circulation; and c) direct staff and the design team to begin the Schematic Design phase, planned to end in November 2009 with the certification of the City Hall and Park Environmental Impact Report (EIR).

The motion carried by the following roll call vote:

Ayes: Council Member Henn, Council Member Rosansky, Mayor Pro Tem Curry, Mayor Selich, Council Member Webb, Council Member Gardner, Council Member Daigle

X. NOTICE TO THE PUBLIC

XI. CITY COUNCIL ANNOUNCEMENTS OR MATTERS WHICH COUNCIL MEMBERS WOULD LIKE PLACED ON A FUTURE AGENDA FOR DISCUSSION, ACTION OR REPORT (NON-DISCUSSION ITEM):

Council Member Gardner announced that people can purchase a license plate from the California Department of Motor Vehicles (DMV) whose proceeds will assist with funding art programs in schools.

Council Member Webb announced that the Newport Beach Film Festival runs from April 23 to April 30 and stated that the closing event will feature "500 Days of Summer," which was directed by his nephew.

Council Member Henn congratulated the Police Department for finishing in first place in the Las Vegas to Bakersfield run for the fifth year in a row. He also announced that the Relay for Life Event will be held on May 16 to May 17 at Newport Harbor High School, noted that the City Council once again will be participating as the Council Critters, and urged all residents to support this worthy cause.

Council Member Rosansky invited residents to attend the beach cleanup day at 11:00 a.m. on Saturday, April 18, at McFadden Square.

Mayor Pro Tem Curry announced that he and City Manager Bludau traveled to Okazaki, Japan, to celebrate the 25th Anniversary of the Sister City relationship. He stated that he rode in the cherry blossom parade, spoke to 150 junior high students, toured the library, and toured an elementary school.

XII. CONSENT CALENDAR

A. READING OF MINUTES/ORDINANCES AND RESOLUTIONS

1. **MINUTES OF THE REGULAR MEETING AND ADJOURNED REGULAR MEETING OF MARCH 24, 2009. [100-2009]** Waive reading of subject minutes, approve as written and order filed.
2. **READING OF ORDINANCES AND RESOLUTIONS. [100-2009]** Waive reading in full of all ordinances and resolutions under consideration, and direct City Clerk to read by title only.

B. CONTRACTS AND AGREEMENTS

3. **IRVINE TERRACE LANDSCAPE IMPROVEMENTS - AWARD OF CONTRACT (C-3865). [38/100-2009]** a) Approve the project plans and specifications; b) award the contract (C-3865) to Tal Cal Engineering, Inc. for the total bid price of \$88,982.00, and authorize the Mayor and City Clerk to execute the contract; and c) establish \$8,900.00 (10%) to cover construction contingency.

4. **2008-2009 CITYWIDE SLURRY SEAL PROGRAM - AWARD OF CONTRACT (C-4086).** [38/100-2009] a) Approve the project plans and specifications; b) award the contract (C-4086) to Pavement Coatings Company for the total bid price of \$463,100.00, and authorize the Mayor and City Clerk to execute the contract; and c) establish an amount of \$46,000 to cover the cost of unforeseen work.
5. **TRAFFIC SIGNAL MODERNIZATION PHASE 1 CONSTRUCTION - COMPLETION AND ACCEPTANCE (C-3975).** [38/100-2009] a) Accept the completed work; b) authorize the City Clerk to file a Notice of Completion; c) authorize the City Clerk to release the Labor and Materials bond 35 days after the Notice of Completion has been recorded in accordance with applicable portions of the Civil Code; and d) release the Faithful Performance Bond one year after Council acceptance.
6. **TRAFFIC SIGNAL MODERNIZATION PHASES 2 AND 3 CONSTRUCTION - AWARD OF CONTRACT (C-3976).** [38/100-2009] a) Approve the project plans and specifications; b) award the contract (C-3976) to C.T. & F., Inc. for the total bid price of \$520,299.47, and authorize the Mayor and City Clerk to execute the contract; and c) establish an amount of \$78,000 (15%) to cover the cost of unforeseen work.
7. **WESTCLIFF STREET LIGHT REPLACEMENT (C-3868) - COMPLETION AND ACCEPTANCE.** [38/100-2009] a) Accept the completed work; b) authorize the City Clerk to file a Notice of Completion; c) authorize the City Clerk to release the Labor and Materials bond 35 days after the Notice of Completion has been recorded in accordance with applicable portions of the Civil Code; and d) release the Faithful Performance Bond one year after Council acceptance.
8. **CONTRACT FOR ENVIRONMENTAL CONSULTING SERVICES AND AGREEMENT BETWEEN THE CITY OF NEWPORT BEACH AND COAST COMMUNITY COLLEGE DISTRICT (C-4184).** [38/100-2009] a) Receive and file notice of permit application; and b) authorize the City Manager and City Clerk to execute an agreement between the City of Newport Beach and Coast Community District.
9. **COUNTY OF ORANGE CITY AID PROGRAM (CAP) AGREEMENT FOR FISCAL YEAR 2009-2010 (C-4010).** [38/100-2009] Approve the agreement between the County of Orange and the City of Newport Beach as required for participation in the County's Proposition 42 City Aid Program (CAP), and authorize the Mayor and City Clerk to execute the agreement.
10. **PROFESSIONAL SERVICES AGREEMENT WITH LSA ASSOCIATES, INC. FOR ENVIRONMENTAL SERVICES ON THE CITY HALL AND PARK DEVELOPMENT PLAN (C-4141).** [38/100-2009] Approve Amendment No. 2 to the Professional Services Agreement with LSA Associates, Inc., and authorize the Mayor and City Clerk to execute the amended agreement.
11. **EMERGENCY REPAIR OF OIL PRODUCTION WELL NO. 11 (C-4174).** [38/100-2009] Approve the Letter Agreement with Oil Well Service Company for emergency repair services to repair Oil Production Well No. 11.
13. **PROFESSIONAL SERVICES AGREEMENT FOR GEOTECHNICAL**

SOILS EVALUATION AS PART OF A CONCEPTUAL DESIGN PLAN FOR A CONFINED AQUATIC DISPOSAL (CAD) SITE IN NEWPORT HARBOR (C-4179). [38/100-2009] a) Authorize the Mayor and City Clerk to execute a professional services agreement with Anchor QEA to conduct a geotechnical soils evaluation for a possible Confined Aquatic Disposal (CAD) site in Newport Harbor; and b) approve a budget amendment (09BA-047) taking \$61,600 in unappropriated General Fund reserves and assign these funds to Capital Improvement Project #7014-C4402001 (Newport Harbor Dredging Project).

C. MISCELLANEOUS

- 14. APPOINTMENT TO THE MEDIA AND COMMUNICATIONS COMMITTEE. [100-2009]** Confirm Mayor Selich's appointment of Council Member Rosansky to the Media and Communications Committee.
- 15. AWARD THE PURCHASE OF SCOTT HUSH AIR COMPRESSOR. [100-2009]** Award the purchase of Scott Hush Air Compressor to Allstar Fire Equipment, Inc. for the total cost of \$41,747.30.
- 16. PURCHASE OF SCOTT AIR PACK EQUIPMENT AND PARTS. [100-2009]** Award the purchase of Scott Air Pack Equipment and Parts to Allstar Fire Equipment, Inc. for the total cost of \$54,242.18.
- 17. PURCHASE OF COMMUNICATION SUITES FOR NEW PARAMEDIC VANS. [100-2009]** a) Authorize the purchase of radios, mobile data computers, GPS trackers and miscellaneous electronic equipment from several vendors for two new paramedic vans; and b) approve a budget amendment (09BA-046) to transfer \$29,800 from Paramedic Reserve Fund (010-3732) to 2340-9300, and increasing expenditure appropriations by \$29,800 in 2340-9300.
- 18. GENERAL PLAN ANNUAL PROGRESS REPORT INCLUDING HOUSING ELEMENT REPORT (PA2007-195). [100-2009]** Receive and file.
- 19. PUBLIC MEETING ON PROPOSED TOURISM BUSINESS IMPROVEMENT DISTRICT (TBID). [100-2009]** Receive public comments from anyone wishing to speak on the Tourism Business Improvement District (TBID).
- S24. CITY COUNCIL LETTER OF SUPPORT FOR OCTA MEASURE "M" ENVIRONMENTAL MITIGATION FUNDING REQUEST FROM BANNING RANCH CONSERVANCY REGARDING POTENTIAL BANNING RANCH PURCHASE. [100-2009]** The City Manager recommends the draft letter of support for the Banning Ranch Conservancy's request be provided.

Motion by Mayor Pro Tem Curry to approve the Consent Calendar, except for the item removed (12).

The motion carried by the following roll call vote:

Ayes: Council Member Henn, Council Member Rosansky, Mayor Pro Tem Curry, Mayor Selich, Council Member Webb, Council Member Gardner, Council Member Daigle

XIII. ITEMS REMOVED FROM THE CONSENT CALENDAR

12. CORONA DEL MAR CONCESSION (FUJI GRILL) - AMENDMENT TO CONCESSION AND LEASE AGREEMENT (C-4017). [38/100-2009]

In response to Laura Curran's questions, Council Member Rosansky clarified that the base rent will be reduced but Fuji Grill is required to pay percentages against the base. He noted that the operator has invested money into the property and is a quality operator.

Motion by Mayor Pro Tem Curry to authorize the Mayor and City Clerk to execute the Third Amendment to the Corona del Mar State Beach Concession and Lease Agreement.

The motion carried by the following roll call vote:

Ayes: Council Member Henn, Council Member Rosansky, Mayor Pro Tem Curry, Mayor Selich, Council Member Webb, Council Member Gardner, Council Member Daigle

XIV. ORAL REPORTS FROM CITY COUNCIL ON COMMITTEE ACTIVITIES

Council Member Daigle reported that she attended the Orange County Sanitation District meeting and noted that they will be amending the regional permit which she will provide to Council for review.

Council Member Gardner reported that the Coastal/Bay Water Quality Committee will be bringing a Miocean proposal before Council to fund visual screens so beaches could display messages, surf and tide conditions, and other educational information.

Regarding group residential uses, Council Member Henn reported that there is steady progress relative to use permit hearings and provided the schedule for upcoming hearings. He also reported that the Hearing Officer denied a reasonable accommodations request from Pacific Shores on March 25 and approved the reasonable accommodation request for 900 West Balboa Boulevard.

Mayor Pro Tem Curry reported that he was appointed to the Orange County Parks Commission and stated that he looks forward to assuming the responsibilities.

XV. PUBLIC HEARINGS - continued

21. REVIEW OF THE COMMUNITY DEVELOPMENT BLOCK GRANT (CDBG) FISCAL YEAR 2009-2010 ONE-YEAR ACTION PLAN FOR SUBMISSION TO THE U.S. DEPARTMENT OF HOUSING AND URBAN DEVELOPMENT (HUD). [100-2009]

Economic Development Coordinator Bowden stated that, besides the applications received for public service provider funding and the standard Capital Improvement Projects (CIP), they received a CIP application from Seaview Lutheran Plaza for \$175,000 to replace a deteriorated plumbing system. Staff believed that the more appropriate funding mechanism is through the City's Affordable Housing Fund.

In response to Council Member Daigle's questions, Assistant City Manager Wood stated that the in lieu funds to preserve affordable housing will help the City meet the low income housing element requirement. Economic Development Coordinator Bowden stated that the action plan would need to be amended if and when the City receives

\$93,000 of stimulus money. Council Member Rosansky expressed support and noted that he would like more information on the issue of funding the Seaview Lutheran request.

Beverly Shuber believed that the funds should be used to assist developers for newly-constructed affordable housing.

Charles R. Gross, President of Seaview Lutheran Plaza, introduced board members in attendance and provided the Plaza's history, construction information, and rental process. He indicated that the strategic plan should include information about how to build and maintain affordable housing in the City.

Motion by Council Member Daigle to a) approve the 2009-2010 CDBG Action Plan; b) authorize the City Manager or his designee to execute the FY 2009-2010 CDBG Program Grant Agreement and all related documents on behalf of the City; and c) adopt Resolution No. 2009-17 authorizing the City Manager to submit the FY 2009-2010 application for CDBG funds and One-Year Action Plan to HUD.

The motion carried by the following roll call vote:

Ayes: Council Member Henn, Council Member Rosansky, Mayor Pro Tem Curry, Mayor Selich, Council Member Webb, Council Member Gardner, Council Member Daigle

XVI. PUBLIC COMMENTS

Lloyd Eichert stated that he is currently working on replicating a 1951 City of Newport Beach police car. He indicated that he is in the process of raising funds and requested that donations be sent to the Police Department with a reference to the Police Car Project.

XVIII. CURRENT BUSINESS

28. IMPLEMENTATION OF CALPERS RETIREMENT FORMULA (3%@50) FOR LIFEGUARD SAFETY EMPLOYEES PER RATIFIED MEMORANDUM OF UNDERSTANDING (JULY 2006 - DECEMBER 2008). [100-2009]

Human Resources Director Cassidy reported that the Memorandum of Understanding (MOU) was previously approved by Council as part of the negotiation process and noted that the 3% at 50 formula was supposed to be implemented prior to December 31, 2008. She also stated that the implementation cost needed to be recalculated and will cost the City \$135,000.

In response to Council questions, Human Resources Director Cassidy stated that this is a contractual obligation that occurred two years ago and was not done prior to the expiration of the contract. City Attorney Hunt clarified that Council will need to approve the agreement or be in breach of contract.

Richard Santos, CalPERS Senior Pension Actuary, clarified that the amount will not change until August 2009.

Motion by Mayor Selich to a) adopt Resolution No. 2009-18 relating to the City's intention to approve an amendment to the contract between the Board of Administration of the California Public Employees' Retirement System (CalPERS) and the Newport Beach City Council to authorize a "3%@50" retirement formula for specified Lifeguard Safety employees within the Fire Department; and b) introduce Ordinance No. 2009-10 authorizing an amendment to the contract between the City Council of the City of

Newport Beach and the Board of Administration of the California Public Employees' Retirement System (CalPERS), and pass to second reading on May 12, 2009.


The motion carried by the following roll call vote:

Ayes: Council Member Henn, Mayor Pro Tem Curry, Mayor Selich, Council Member Webb, Council Member Gardner, Council Member Daigle
Noes: Council Member Rosansky

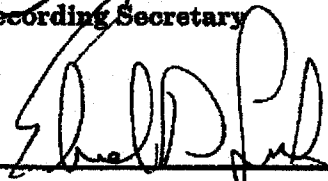
XIX. MOTION FOR RECONSIDERATION - None

XX. ADJOURNMENT - Adjourned at 10:45 p.m. in memory of John Allen Standage, Audrey McIntosh, and John McIntosh

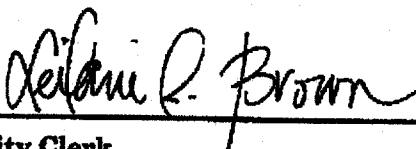
The agenda for the Regular Meeting was posted on April 11, 2009, at 3:30 p.m. on the City Hall Bulletin Board located outside of the City of Newport Beach Administration Building. The amended agenda for the Regular Meeting was posted on April 13, 2009, at 3:38 p.m. on the City Hall Bulletin Board located outside of the City of Newport Beach Administration Building.



Recording Secretary



Mayor



City Clerk



Exhibit No. 3

**Correspondence from City's Counsel to
Applicant**



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ATTORNEYS AT LAW - A PROFESSIONAL CORPORATION

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GLENN R. WATSON
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HARRY L. GERSHON
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WILLIAM L. STRAUSS
MITCHELL E. ABBOTT
GREGORY W. STEPANIOICH
ROCHELLE BROWNE
QUINN M. BARROW
CAROL W. LYNCH
GREGORY M. KUHRT
THOMAS M. JIMBO
ROBERT C. CECCON
STEVEN H. KAUFMANN
KEVIN G. ENNIS
ROBIN O. HARRIS
MICHAEL ESTRADA
LAURENCE S. WIENER
STEVEN R. ORR
D. TILDEN KIM
SASKIA T. ASAMURA
KAYSER O. SUME
PETER M. THORSON
JAMES L. MARKMAN
CRAIG A. STEELE
T. PETER PIERCE
TERENCE R. BOGA
LISA BOND
JANET E. COLESON
ROXANNE M. DIAZ
JIM G. GRAYSON
ROY A. CLARKE
WILLIAM P. CURLEY III
MICHAEL F. YOSHIBA
REGINA N. DANHER
PAULA GUTIERREZ BAEZA
BRUCE W. GALLOWAY
DIANA K. CHUANG
PATRICK K. BOSKO
NORMAN A. DUPONT
DAVID M. SNOW
LOLLY A. ENRIQUEZ
KIRSTEN R. BOWMAN
BILLY D. DUNSMORE
AMY GREYSON
DEBORAH R. HAKMAN
D. CRAIG FOX
SUSAN E. RUSNAK
G. INDER KHALSA
GINETTA L. GIOVINCO
TRISHA ORTIZ
CANDICE K. LEE
DAVID G. ALDERSON
MELISSA M. CROSTHWAITE
MARICELA E. MARROQUIN
GENA M. STINNETT
JENNIFER PETRUSIS
STEVEN L. FLOWER
CHRISTOPHER J. DIAZ
DEBBIE Y. CHIO
GEOFFREY WARD
ERIN L. POWERS
TOUSSAINT S. BAILEY
WHITNEY G. McDONALD
SERITA R. YOUNG
VERONICA S. GUNDERSON
SHIRI KLIMA
DIANA H. VARAT
KATRINA C. GONZALES

OF COUNSEL
MARK L. LAMKEN
SAYRE WEAVER
JIM R. KARPIAK

SAN FRANCISCO OFFICE
TELEPHONE 415.421.8484

ORANGE COUNTY OFFICE
TELEPHONE 714.990.0901

June 8, 2009

**VIA FACSIMILE (202) 537-2986
AND U.S. MAIL**

Steven G. Polin
Law Offices of Steven G. Polin
3034 Tennyson Street, NW
Washington, D.C. 20015

Re: *Newport Coast Recovery, LLC - Reasonable Accommodation Requests*

Dear Mr. Polin:

As you know, attorneys from our offices are assisting the City of Newport Beach and the Newport Beach City Attorney in processing Use Permit applications and Reasonable Accommodation requests. I write this letter regarding the reasonable accommodation requested by your client, Newport Coast Recovery, LLC.

The City asks that you clarify your client's requests so that City staff may properly evaluate them. Specifically, staff needs to know, in response to question 3 of the reasonable accommodation application form, which provisions of the Newport Beach Municipal Code you would like the City to waive or modify for your client.

Your stated preference for the "adoption of the Staff report and recommendation (PA2008-104 for UP2008-033)..." is not a cognizable request for accommodation. At the same time, Staff cannot properly evaluate your "alternative" request, which is a request for a blanket waiver of an unprioritized laundry list of development and operational standards applicable to group homes in residential areas. Please provide a list of the specific standards that you wish the City to modify and a description of how you think they should be modified. Additionally, please state whether any of these modifications are requested in the alternative, and if so, the order of your client's preference.

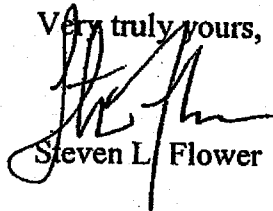
Steven G. Polin
June 8, 2009
Page 2

Likewise, the City asks that you clarify (or perhaps consider withdrawing) the request that the City treat your client's facilities in the City as legal non-conforming uses.

In order for City Staff to have sufficient time to evaluate your requests before the July 7th hearing, we ask that you provide the requested clarifications not later than this Friday, June 12th at 5:00 p.m., PST.

If you have any questions regarding this letter, or wish to discuss this matter further, please feel free to contact me at the number listed above.

Very truly yours,



Steven L. Flower

11287-0010\1142629v2.doc

cc: Patrick "Kit" Bobko

Exhibit No. 4

**Correspondence from Applicant's
Counsel to Staff**

STEVEN G. POLIN, ESQ.
Attorney At Law

3034 TENNYSON ST. N.W.
WASHINGTON, D.C. 20015

TEL (202) 331-5848
FAX (202) 537-2986
SPOLIN2@EARTHLINK.NET

June 11, 2009

SENT VIA ELECTRONIC MEANS AND FIRST CLASS MAIL

Steven L. Flower, Esquire
Richards | Watson | Gershon
355 South Grand Avenue, 40th Floor
Los Angeles, California 90071-1469

RE: Newport Coast Recovery
Reasonable Accommodation Requests

Dear Mr. Flower

This is in response to your letter dated June 8, 2009 requesting that Newport Coast Recovery clarify or modify its request for a reasonable accommodation made on April 7, 2009.

We have carefully reviewed the City's views on the completeness of Newport Coast Recovery's request for a reasonable accommodation. Please be advised that we are satisfied that Newport Coast Recovery's request for a reasonable accommodation as submitted fulfills the requirements of 42 U.S.C. §3604(f)(3)(B) and that no changes are necessary.

If you have any questions or need to discuss this matter further, please do not hesitate to contact me at 202-331-5848.

Sincerely yours,


Steven G. Polin

cc: Newport Coast Recovery, LLP
Christopher Brancart
Patrick Bobko
Dana Mulhauser
Paul E. Smith

Exhibit No. 5

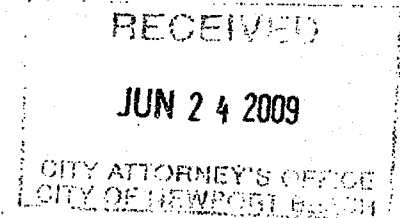
Correspondence from City Staff to
Applicant's Counsel and Reply



CITY OF NEWPORT BEACH

June 18, 2009

Steven G. Polin, Attorney at Law
3034 Tennyson St. N.W.
Washington, D.C. 20015



RE: Newport Coast Recovery Reasonable Accommodation Requests

Dear Mr. Polin,

Through its outside counsel, Richards Watson Gershon, the City is informed that you have declined on behalf of your client to modify or clarify the various requests for reasonable accommodation made by Newport Coast Recovery, LLP.

The City's request for clarification was based on what we believe to be ambiguous phrasing of some of Newport Coast Recovery's requests, and in some cases requests that failed to specify any City requirement from which an exemption is requested. Based on your letter of June 11, 2009, City staff will do its best to provide a full and accurate analysis of what it believes your client appears to be asking for. However, staff cannot be held responsible for any perceived misinterpretations of vague and ambiguous requests that may result.

The City's suggestion to modify or submit additional requests was made in the spirit of engaging in an interactive process that might identify additional requests for accommodation that the City could recommend granting. Staff assumes from your June 11, 2009 response that you and your client have no interest in engaging further in the interactive process.

In addition, you have made a request to receive the staff report 10 days before the hearing date. While staff will attempt to accommodate this request as a courtesy, due to the complex and varied nature of your client's requests, we cannot guarantee that the report will be available in the time requested, and indeed have not done so with other applicants. Staff will make every effort to provide the report to you and the Hearing Officer in a timely manner.

Regards,

Dave Kiff
Assistant City Manager

cc: Michael Newman, Newport Coast Recovery, LLP
T. Peter Pierce
Patrick Bobko
Catherine Walcott

STEVEN G. POLIN, ESQ.
Attorney At Law

3034 TENNYSON ST. N.W.
WASHINGTON, D.C. 20015

TEL (202) 331-5848
FAX (202) 537-2986
SPOLIN2@EARTHLINK.NET

June 25, 2009

SENT VIA ELECTRONIC MEANS AND FIRST CLASS MAIL

Patrick Bobko, Esquire
Richards | Watson | Gershon
355 South Grand Avenue, 40th Floor
Los Angeles, California 90071-1469

RE: Newport Coast Recovery
Reasonable Accommodation Request

Dear Mr. Bobko,

This is in response to the letter dated June 18, 2009 from Dave Kiff concerning Newport Coast Recovery's (hereinafter "NCR") request for a reasonable accommodation.

Mr. Kiff asserts that the City is attempting to clarify "ambiguous phrasing" in NCR's reasonable accommodation request, by requesting that NCR modify or amend its request. Mr. Kiff further asserts that NCR's response to the City's earlier request to modify or amend its request, by responding that it is satisfied with the request as submitted, is a refusal to engage in an "interactive process."

NCR's reasonable accommodation request is concise and specific as to what it is seeking in terms of a reasonable accommodation. (See section 3 of the request). The fact that Mr. Flower stated in his June 8, 2009 that NCR's request for "adoption of the Staff report and recommendation (PA2008-104 for UP2008-033) . . . "is not a cognizable request for accommodation" and further stated that "At the same time, Staff cannot properly evaluate your "alternative" request, which is a request for a blanket waiver of an unprioritized laundry list of development and operational standards applicable to group homes in residential areas. . ." constitutes a denial of NCR's request for a reasonable accommodation. NCR's need only show that its request is reasonable on its face. NCR is seeking (1) adoption of the staff report that recommended approval of its use permit application; (2) the waiver of several of the criteria that the City utilizes in evaluating applications made by providers of housing when it makes in its decision in determining whether to allow these providers to continue to provide housing for persons with disabilities; or, (3) waiver of the criteria relied upon by the hearing officer that resulted in the denial of its use permit application.

NCR is open to honest and good faith dialogue in an attempt to craft a reasonable accommodation that the City will warmly embrace. However, Mr. Kiff is mistaken that the Federal Fair Housing Act requires that the parties engage in an "interactive process" in land use matters.

Patrick Bobko, Esquire
June 25, 2009

2

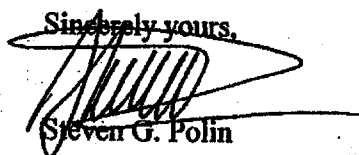
Unlike a landlord which has the authority to grant a request for a reasonable accommodation, in which a an "interactive process" might be beneficial, the City and its staff cannot grant such a request, since it has ceded its authority to grant such requests to a hearing officer. *See, Lapid-Laurel v. Zoning Bd. of Adjustment*, 284 F.3d 442, 455-456 (3d Cir. N.J. 2002)(we hold that notwithstanding the "interactive process" requirement that exists in the law of this court in the employment context under the Rehabilitation Act, *see Mengine*, 114 F.3d at 420, the FHAA imposes no such requirement on local land use authorities).

Base on our previous experience with the City in the reasonable accommodation process, as well as reviewing how the City "interacts" with other providers of housing for the disabled in the reasonable accommodation process, NCR's request was made after careful thought, and with specificity. Also based on our previous experience with City, we do not believe that the City's suggestions are made with an eye toward reaching a workable solution in terms of coming to an agreement as to reaching an agreement in the terms, conditions and privileges of the granting of NCR reasonable accommodation request.

Finally, NCR's request for a reasonable accommodation was submitted on April 7, 2009. The City is required to promptly address requests for a reasonable accommodation. Approximately two months passed before the City responded to NCR's reasonable accommodation request. *See Flowers'* letter, dated June 8, 2009. Two months is sufficient time to process NCR's request. Fundamental fairness to all parties requires the City to provide NCR adequate time to receive and prepare a response to the City's staff report and recommendation to the hearing officer on NCR's request. The City's practice of providing an applicant its staff report two or three days prior to the hearing is neither workable nor fair, and NCR will not participate in any hearing if the staff report is not delivered to us ten days prior to the hearing.

Please contact me if you or any personnel from the City wishes to discuss this letter.

Sincerely yours,



Steven G. Polin

cc: Chris Brancart
Mike Newman
Dave Kiff
Dana Mulhauser
Paul Smith

Exhibit No. 6

E-mail from J. Robbins of ADP to D. Kiff

Wolcott, Cathy

From: Kiff, Dave
Sent: Friday, April 03, 2009 2:53 PM
To: Wolcott, Cathy
Subject: FW: Newport Coast Recovery

From: Joan Robbins [mailto:jrobbins@ADP.CA.GOV]
Sent: Friday, April 03, 2009 2:52 PM
To: Kiff, Dave; Joy Jarfors
Cc: Michael Ellison; Allen Scott
Subject: RE: Newport Coast Recovery

Thanks Dave. I sent my notes from our telephone conversation to Joy Jarfors, Manager with the Program Compliance Branch. Joy is the Manager in charge of program and counselor complaints. Newport Coast Recovery, 1216 West Balboa Blvd., Newport Beach is not approved as an adolescent waiver program. This facility is licensed for 29 beds, male only.

Joy - Dave Kiff's telephone number is (949) 644-3032.

From: Kiff, Dave [mailto:DKiff@city.newport-beach.ca.us]
Sent: Friday, April 03, 2009 2:45 PM
To: Joan Robbins
Subject: Newport Coast Recovery

**Attachment C to City Planning Dept.
Memorandum: Administrative Record from
May 20 2008 to April 14, 2009**

Attachment No. HO 3

**Administrative Record: May 20, 2008, to
April 14, 2009**

CITY OF NEWPORT BEACH

OFFICE OF THE CITY ATTORNEY

DATE: April 10, 2009
TO: Honorable Mayor and City Council
FROM: David R. Hong, City Attorney
Matter: Newport Coast Recovery Use Permit Appeal
(A09-00397)
RE: After Acquired Evidence



Staff has learned of issues related to the Newport Coast Recovery's operations since the close of the hearing before the Hearing Officer. They relate to treatment of minors at the facility in violation of Newport Coast Recovery's license. We have appended a copy of a memorandum from the Assistant City Manager as Attachment 5¹ summarizing the information that came into his possession. In addition, we have appended a redacted copy of a Newport Beach Police Department report as Attachment 6 detailing a contact with the facility related to the issue. We provided counsel for Appellant, Steve Polin, Esq., notice of this evidence via email dated April 9, 2009 and a copy of the Police report today. We are submitting the information to the Council for consideration of its relevance as it relates to the hearing of the appeal.

After acquired evidence is not part of the Hearing Record. It, therefore, is not relevant to your determination of the "substantial evidence" issue, which is determinative of the appeal that is before you. In order to be relevant to that issue, it had to be available to the Hearing Officer. By its nature, it was not, so you are faced with the question of what, if anything, to do with the evidence.

We do not have any explicit provisions in our ordinance that govern the issue of such evidence. The only guidance we have, therefore, is existing law through analogy. The provisions of Code of Civil Procedure section 1094.5 are helpful. Subdivision (e) of section 1094.5 provides that if you determine the evidence (1) could not have been produced at the hearing on the use permit through the exercise of reasonable diligence and (2) it is relevant to the issue that was before the Hearing Officer, then you may remand the matter to the hearing officer for consideration of the evidence in relationship to his decision. You cannot, however, use the evidence to support a substantive decision on the appeal since it was not part of the Hearing Record before the Hearing Officer.

We need your direction on what to do about this evidence. Your options are:

1. Determine findings (1) and/or (2) cannot be made, and thus, the evidence is not admissible on the issues at all and will not be considered; or

¹ We are using consecutive numbers from the Council Staff Report for numbering of the attachments.

2. Findings (1) and (2) can be made and the Hearing Officer needs to consider this evidence in the context of a decision on the merits of the application, and if so, remand the matter to the Hearing Officer for its consideration in making his decision on the substance of the application; or
3. Findings (1) and (2) can be made but the evidence is not necessary to the decision on the application and you will decide the appeal on its merits now, either granting the appeal and overturning the Hearing Officer's decision or overruling the appeal and affirming the Hearing Officer's decision, without considering the after acquired evidence.

DRA

Attachment 5 – Newport Coast Recovery (1216 West Balboa) Appeal – Recently Acquired Information, April 8, 2009

Attachment 6 – Employees Report, Newport Police Department, March 31, 2009

Cc: Steve Polin, Esq.
Chris Brancart, Esq.
Dave Kiff, Assistant City Manager
Kit Bobko, Special Counsel



CITY OF NEWPORT BEACH

MEMORANDUM

TO: David Hunt, City Attorney

FROM: Dave Kiff, Assistant City Manager
Kit Bobko, Special Counsel

DATE: April 8, 2009

RE: **Newport Coast Recovery (1216 West Balboa) Appeal – Recently Acquired Information**

The following is a partial summary of information to which Mr. Kiff can personally attest. On or about late March 2009, a mother who claimed to have a 17 year-old child in treatment at Newport Coast Recovery ("Appellant") for cocaine addiction contacted staff. The information staff received from the boy's mother was troubling, and casts doubt upon whether the Appellant can properly manage this treatment facility.

Among the troubling issues identified by staff:

- Appellants knowingly accepted two minor boys for treatment at Newport Coast Recovery in apparent violation of their license from ADP (ADP officials told the City on Friday, April 3, 2009 that there is no record of Newport Coast Recovery having an "adolescent waiver" authorizing Newport Coast to treat adolescents);
- There are allegations that one of the minors was instructed by Newport Coast Recovery Staff to lie about his age if asked;
- One of the minor boys was taken off-site in another resident's personal vehicle, where the minor relapsed. The minor boy was then removed from Appellant's facility and taken to a sober living facility in Costa Mesa without notifying the child's parents;
- When Newport Beach and Costa Mesa Police found the child, Newport Coast Recovery told the police that they would not take him back into their facility because he was a minor, effectively abandoning him. The boy's family is in Las Vegas, NV and Clovis, CA, and he had no means to get home;

The Municipal Code states the standard of review for this appeal "shall not be *de novo*," and that the "City Council shall determine whether the findings made by the Hearing Officer are supported by substantial evidence presented during the evidentiary hearing." See NBMC §20.91A.040. The Code further states the City Council, acting as the appellate body, "may sustain, reverse or modify the decision of the Hearing Officer or remand the matter for further consideration, which remand shall include either specific issues to be considered or a direction for a *de novo* hearing." See NBMC §20.91A.040.

Staff notes the Code does not include any provisions (or prohibitions) regarding the newly produced evidence that, through the exercise of reasonable diligence, could not have been produced at the Use Permit hearing.

Because the Municipal Code prohibits the Council from conducting a *de novo* hearing, and because this newly acquired evidence bears directly upon the Applicant's ability to operate the facility, we recommend that:

1. Mr. Steven G. Polin, Appellant's counsel, be provided with this information and provided an opportunity to respond;
2. In light of the time required for the Appellant to respond, that the City Council be asked to remand this matter to the Hearing Officer pursuant to NBMC §20.91A.040 for further consideration of this "specific issue."
3. That the City Council be asked to require it be heard by some date certain, so that it can return for appeal promptly.

#

EMPLOYEES REPORT

Subject Newport Coast Recovery		DR Number 09-02894	
Date and Time Occurred 3-31-2009 1000	Location of Occurrence 1216 W. Balboa Blvd.		RD 19
To: (Rank, Name, Assignment, Division) Lt. Frizzell		Date and Time Reported 3-31-2009 1000	
Reportable Use of Force: <input type="checkbox"/> Yes <input checked="" type="checkbox"/> No			
<p>W1: Eric McCoy (Program Director, Newport Coast Recovery) 11/18/1973 35yrs 1216 W. Balboa Blvd. Newport Beach, CA. 92661 949-723-3155 714-756-1300c</p> <p>On 03-31-2009 at approximately 1000 hours, Sgt. Mark Hamilton and I responded to 1216 W. Balboa (Newport Coast Recovery) in reference to reports that the facility was treating minor children in violation of their DSS license. The reporting party, Witness [REDACTED] alleged that she sent her minor son to the location for treatment. [REDACTED] states that her son was told to lie about his age due to the fact that minors were not permitted at the location. [REDACTED] filed a complaint with the City of Newport Beach, and we were requested to investigate.</p> <p>Upon arrival at the location, we contacted Program Director Eric McCoy. I asked McCoy if [REDACTED] was a resident of the facility and he stated "I cannot confirm or deny," that he is a resident of the facility. McCoy claimed all residents have confidentiality based upon medical privilege laws. We told McCoy that we were responding to a complaint that the facility was housing minor children, (under 18), for the purposes of medical treatment in violation of their DSS license. We asked McCoy if there were currently any residents under the age of 18 at his facility and he said "No, there are none here now." We asked McCoy if [REDACTED] had been a resident and he again stated that he could not confirm or deny any particular persons presence at the facility. McCoy stated he had been gone on vacation and just recently returned. McCoy did confirm that there had been minors in the facility while he was gone, but was unaware of who authorized their placement. McCoy stated the minors had since been removed from the facility and returned to their parents within the past week. McCoy was advised not to house any minors because it violated state policy regarding his particular treatment facility.</p>			
Supervisor Approving	ID No.	Reporting Officer(s)	ID No.
Date and Time Reproduced and Distributed	Clerk	Schuster	1277

NRPD Form 10.7 (Rev. 12/08)

Employee Report

Continuation Sheet

Page No. 2	Type of Report Employees Report	Booking No.	DR Number 09-02894
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On 03-31-2009 at approximately 1500 hours. Sgt. Hamilton and I responded back out to the Newport Coast Recovery at 1216 W. Balboa Blvd. We had received new information that the facility was still treating and housing minors contrary to what Wit McCoy had previously told us. We first contacted an unidentified male resident who claimed to live at the facility. We asked him if he knew of [REDACTED] (minor) and he said "yes". We asked the subject if [REDACTED] was current a resident at the facility and he said "yes". The subject went on to tell us that [REDACTED] was removed from the facility on Saturday (3-28-09) for disciplinary reasons. He said they moved [REDACTED] to a different facility in Costa Mesa. NFD

We then recontacted Wit McCoy and asked him about [REDACTED] McCoy confirmed [REDACTED] was removed from the facility and transferred to a Costa Mesa facility on Saturday. McCoy stated he had already attempted to contact the owner regarding the state violations regarding minors in the facility. McCoy said [REDACTED] was due to return today, but he has since stopped the process of return based upon our previous contact with him. [REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]

It should also be noted that we responded to the facility twice and did not observe any residents that appeared to be under the age of 18. McCoy also stated that there were not "currently" any minors at the facility.

Supervisor Approving	ID No.	Reporting Officer(s) Schuster	ID No. 1277
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CITY OF NEWPORT BEACH

OFFICE OF THE CITY ATTORNEY

DATE: April 7, 2009

TO: Honorable Mayor and City Council

FROM: David R. Hunt, City Attorney

RE: Newport Coast Recovery's Request for a Stay
Of Its Appeal of the Denial of Its Use Permit;
April 14, 2009 Agenda, Item No. 20



As we were finalizing our staff report, we received a request from Newport Coast Recovery, LLC's ("Newport Coast Recovery") attorney, Steve Polin, Esq., requesting a stay of the appeal hearing in this matter. We attach an email chain dated April 7, 2009 along with a copy of Mr Polin's letter making that request as Attachment "A" for your review. As you can see from the email chain, we informed Mr. Polin the decision on whether to stay the appeal would need to be made by you on the night of the hearing.

On this issue, the history of this appeal is as follows:

- **February 4, 2009:** Hearing Officer's decision final.
- **February 11, 2009:** Newport Coast Recovery's initial "Appeal Notification" executed by Michael Newman on behalf of Newport Coast Recovery.
- **February 24, 2009:** Application to Appeal Decision of Hearing Officer filed by Applicant.
- **March 12, 2009:** Office of the City Attorney letter to Appellant re appeal hearing scheduled for Council March 24, 2009 agenda. (See, Attachment "B.")
- **March 18, 2009:** Staff recommends continuance of matter pursuant to request of Appellant's counsel, Steve Polin, Esq., to date certain of April 14, 2009.
- **March 24, 2009:** Matter originally scheduled for hearing on Council agenda and Council acts to continue matter to date certain of April 14, 2009, per staff's recommendation.
- **March 27, 2009:** Office of the City Attorney sends letter to Appellant's counsel informing him of continuance to date certain. (See Attachment "C".)
- **April 6, 2009:** Office of the City Attorney sends Appellant's counsel an email of that date re appeal hearing and staff report schedule. (See, Attachment "A".)
- **April 7, 2009:** Applicant's counsel submits request for stay of appeal hearing through email and letter of that date. (Attachment "A".)

We have informed Mr. Polin that we cannot make the decision regarding the stay request, but we will brief the Council on the request and the issue will be addressed at the outset of the hearing on April 14, 2009.

DRH